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Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?

*Mark Strasser**

I. INTRODUCTION

One of the most controversial birth-related torts is the wrongful life action in which a plaintiff sues for damages, claiming that he would have been better off never having lived at all and, but for defendant's negligence, would not in fact have lived. Most jurisdictions refuse to recognize this cause of action. However, the justifications for those refusals are often unpersuasive, since the acceptance of those rationales would imply that other existing practices must be changed. For example, although wrongful life and wrongful birth are different actions involving different duties and harms, many of the rationales for and against recognizing the former apply with equal force to the latter. If the arguments against recognizing wrongful life are persuasive, then the continued recognition of wrongful birth claims may be in jeopardy.

The existence of wrongful death actions might seem to provide no basis for recognizing wrongful life actions. However, examinations of some of the factors which are *not* thought to be a bar to recognizing the former actions and of what will *not* be considered in wrongful death damage awards reveal that some of the arguments offered to justify refusing to recognize wrongful life actions are unsound. Further, when the arguments against recognizing wrongful life actions are considered in light of refusal of treatment jurisprudence, their speciousness is made manifest.

Part II of this Article provides a brief introduction to some of the birth-related torts, suggesting that although the wrongful life action is unique among these torts, many of the rationales for recognizing the other birth-related torts also apply to this one. Part III discusses one of the first wrongful life cases, *Zepeda v. Zepeda*,¹ in which a child sued his father for having conceived him out of wedlock. *Zepeda* is helpful to consider because it illustrates both the facets of the wrongful life claim and some of the misconceptions about that claim. Part IV discusses the different elements of the wrongful life action—duty, breach, causation, and harm—and concludes that in at least some cases all of these elements may be established. It also discusses how the wrongful birth and wrongful death analyses lend support to recognizing wrongful life claims and how the refusal of treatment jurisprudence undermines some of the rationales for

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1. 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

refusing to recognize wrongful life claims. The Article concludes that given some of the recent developments in the law, jurisdictions should re-examine their refusals to recognize an action for wrongful life.

II. BIRTH RELATED TORTS

Jurisdictions recognize a number of birth-related torts ranging from wrongful conception and wrongful pregnancy to wrongful birth and wrongful life. In cases involving any of these actions, someone (usually a medical professional) has acted negligently and that negligence has resulted in the birth of an unwanted child. In an action for wrongful pregnancy, wrongful conception, or wrongful birth, the *parents* of the child bring the action,² whereas in an action for wrongful life, the *child* (through his or her representative) brings the action.³

2. See, e.g., *Walker by Pizano v. Mart*, 790 P.2d 735, 737 (Ariz. 1990) (explaining that in a wrongful conception or pregnancy action, "parents of a normal but unplanned child seek damages either from a physician who allegedly was negligent in performing a sterilization procedure or abortion, or from a pharmacist or pharmaceutical manufacturer who allegedly was negligent in dispensing or manufacturing a contraceptive prescription or device"). In *Walker by Pizano*, the court further explained:

[P]arents of a child born with birth defects allege that the negligence of those charged with prenatal testing or genetic counseling deprived them of the right to make a timely decision regarding whether to terminate a planned pregnancy because of the likelihood that their child would be born physically or mentally impaired.

Id. See *Smith v. Gore*, 728 S.W.2d 738, 741 (Tenn. 1987) ("Wrongful pregnancy or conception is an action brought by the parents on their own behalf to recover damages resulting from a failed pregnancy avoidance technique (e.g., vasectomy, tubal ligation, abortion, misfilled birth control prescription, etc.); usually the resulting child is healthy."). The *Smith* court explained:

Wrongful birth is an action by the parents on their own behalf to recover damages for the birth of an impaired child when the impairment results either from an act or omission of the defendant or because the defendant failed to diagnose or discover a genetic defect (e.g., genetic counseling, failure to perform readily available diagnostic tests, etc.) in the parents or the infant in time to obtain a eugenic abortion or to prevent pregnancy altogether.

Id.

3. See *Walker by Pizano*, 790 P.2d at 737 (explaining that a wrongful life action "is brought by or on behalf of the children themselves"); *Smith*, 728 S.W.2d at 741 ("Wrongful life is that action brought on behalf of an impaired child to recover damages for having been born with defects due to an act or omission of defendant."); see also Timothy J. Dawe, Note, *Wrongful Life: Time for a "Day in Court,"* 51 OHIO ST. L.J. 473, 476 (1990). As Dawe recognizes:

[W]rongful life suits are brought by or on behalf of the impaired infant himself. This distinguishes claims for wrongful life from those for "wrongful birth," which are brought instead by the parents of the impaired child for the

Suppose that a physician negligently performs a sterilization procedure⁴ or negligently fails to discover that a woman has contracted rubella during her pregnancy,⁵ or negligently fails to treat an Rh-negative mother after the birth of an Rh-positive child, thereby causing future Rh-positive children to have severe difficulties.⁶ In each of these kinds of cases, a child might be born who would have severe difficulties and who might require extensive and very expensive medical care.⁷ The parents of such a child might face heavy emotional or

emotional and financial damages that they have suffered as a result of the birth.

Id.

4. See, e.g., *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1153 (La. 1988) ("This medical malpractice suit . . . arises out of a surgeon's alleged negligence which caused the failure of a bilateral tubal ligation to sterilize the mother.").

5. See, e.g., *Eisbrenner v. Stanley*, 308 N.W.2d 209, 210 (Mich. Ct. App. 1981) ("[Plaintiffs] alleged that Dr. Stanley negligently failed to diagnose Mrs. Eisbrenner's rubella, despite the fact that he had seen test results which indicated she had contracted the disease, and that he negligently failed to warn plaintiffs of the possibility that the child would be born with rubella-caused defects.")

6. See, e.g., *Empire Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 764 P.2d 1191, 1193 (Colo. 1988) ("A sensitized RH-negative woman's blood contains antibodies which, during pregnancy, cross the placenta into the RH-positive fetus and attack the fetal blood causing anemia. About fifteen percent of fetuses with EBF die before birth, usually after twenty-eight weeks of gestation.") (citing R. Phibbs, *Hemolytic Disease of the Newborn (Erythroblastosis Fetalis)*, in *PEDIATRICS* 1029-30 (A. Rudolph & J. Hoffman eds., 18th ed. 1987)).

7. See *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 482 (Ct. App. 1980), *overruled in part by Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982). In *Curlender*, the plaintiff suffered from

mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulbar palsy, inability to feed orally, decerebrate rigidity and gross physical deformity.

Id. See *id.* (discussing allegations that plaintiff suffers "pain, physical and emotional distress, fear, anxiety, despair, loss of enjoyment of life, and frustration"); *Blake v. Cruz*, 698 P.2d 315, 316 (Idaho 1984). In *Blake*, the child had

nerve deafness, with a 100% hearing loss in her right ear and a 75 decibel loss in her left ear. She wears two hearing aids and her speech is extremely limited. She has visual problems caused by scarring of the retina, a condition which causes vision to be cloudy and spotty, and for which there is no means of correction. She has heart malfunctions which involve deformities of both the valves and arteries and which will eventually require open heart surgery.

Id. See *Proffitt v. Bartolo*, 412 N.W.2d 232, 234 (Mich. Ct. App. 1986) ("Maya was born with microcephaly, mental retardation, severe bilateral eye malformations resulting in blindness, and other severe congenital malformations caused by a rubella infection or another intrauterine viral, parasitic or protozoic infection transmitted to Maya during the early stages of fetal development."); *Greco v. United States*, 893 P.2d 345, 347 (Nev.

financial burdens that they might have taken specific steps to avoid, for example, by having sought sterilization,⁸ or by having sought to discover whether the mother had contracted rubella early in the pregnancy, e.g., in order to decide whether to obtain an abortion.⁹ Courts and legislatures must decide whether liability may be imposed in any of these kinds of cases. If liability is to be imposed in some cases but not in others, distinctions must be offered which will make these differentiations seem reasonable. Regrettably, those distinctions have not been forthcoming. Many jurisdictions have recognized wrongful birth actions¹⁰ while only a few have recognized wrongful life actions.¹¹ Since many

1995) (involving a claim that the physicians' negligence "caused Joshua to be born into a grossly abnormal life of pain and deprivation"); *Smith v. Cote*, 513 A.2d 341, 342 (N.H. 1986) ("Heather suffers from bilateral cataracts, multiple congenital heart defects, motor retardation, and a significant hearing impairment. She is legally blind, and has undergone surgery for her cataracts and heart condition."); *Ellis v. Sherman*, 515 A.2d 1327, 1328 (Pa. 1986) ("[T]he child's manifestations include severe mental retardation, physical and motor development delay, deformity, and seizures."); *Naccash v. Burger*, 290 S.E.2d 825, 827 (Va. 1982) (explaining that a Tay-Sachs child "appears normal at birth, but, at four to six months, its central nervous system begins to degenerate, and it suffers eventual blindness, deafness, paralysis, seizures, and mental retardation. The life expectancy of an afflicted child is two to four years").

8. See *Simmons v. Hertzman*, 651 N.E.2d 13 (Ohio Ct. App. 1994) (involving parents' claim for damages resulting from birth of handicapped child after negligently performed vasectomy).

9. *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981). The Seventh Circuit explained:

[T]he cause of action is not based on the injuries to the fetus but on defendant's failure to diagnose Mrs. Robak's rubella and inform her of the consequences If the clinic staff had not breached its duty to Mrs. Robak, she would have had a legal abortion that would have saved the Robaks from the damages they have incurred.

Id. See *Blake v. Cruz*, 698 P.2d 315, 316 (Idaho 1984) (suspecting that she was pregnant and had rubella, plaintiff "specifically requested that the doctor test her for both pregnancy and rubella"); *Proffitt v. Bartolo*, 412 N.W.2d 232, 234 (Mich. Ct. App. 1986) ("Plaintiffs allege that, had Dr. Bartolo properly diagnosed Yasmin's condition and adequately advised them, they would have terminated Yasmin's pregnancy [The child's difficulties were] caused by a rubella infection or another intrauterine viral, parasitic or protozoic infection transmitted to Maya during the early stages of fetal development.").

10. See *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993). In *Keel*, the court held:

Like most of the other courts that have considered this cause of action [wrongful birth], we hold that the parents of a genetically or congenitally defective child may maintain an action for its wrongful birth if the birth was the result of the negligent failure of the attending prenatal physician to discover and inform them of the existence of fetal defects.

Id. See Martin B. Morrissey, Comment, *Wrongful Life Actions in the 1990's: The Continuing Need to Define and Measure a Plaintiff's Injury*, 23 U. TOL. L. REV. 157, 158 <https://scholarship.law.missouri.edu/mlr/vol64/iss1/7>

of the reasons supporting recognition of the former also support recognition of the latter, courts and legislatures should either offer plausible reasons explaining this apparent anomaly¹² or should re-examine their current policies.

III. *Zepeda v. Zepeda* AND WRONGFUL LIFE

Actions for wrongful life often involve children who have severe physical handicaps.¹³ However, there is nothing about the nature of the action that requires such a limitation, since the same claim might be made by someone with severe mental or emotional handicaps. Basically, a wrongful life claim alleges that because of one individual's negligence, another individual is forced to live such an unbearable life that it would have been better for the latter individual never to have lived at all and, but for that negligence, that individual would not in fact have lived.¹⁴

(1991) ("Most jurisdictions allow wrongful birth actions.").

11. The supreme courts of California, New Jersey, and Washington have recognized wrongful life actions, and the Supreme Court of Louisiana has suggested that it would do so under the right circumstances. *See Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988); *see also* Tara C. Fappiano, Note, *Finding a Legal Remedy for the HIV-Positive Infant: Wrongful Life and Lack of Informed Consent Explored*, 12 ST. JOHN'S J. LEGAL COMMENT. 205, 210-11 (1996) (discussing these cases).

12. *See* John F. Hernandez, *Perinatal Transmission of HIV: Cause for the Resurrection of Wrongful Life*, 27 J. MARSHALL L. REV. 393, 405 (1994) ("The courts' continued preference to allow parties to proceed with actions for wrongful birth, while generally disallowing actions for wrongful life, is troublesome.").

13. *See, e.g., Rossi v. Somerset Ob-Gyn Ass'n*, 879 F. Supp. 411, 412 (D.N.J. 1994) (involving child born with "multiple birth defects"); *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 482 (Ct. App. 1980), *overruled in part by Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982). In *Curlender*, the court explained that as a result of the disease, plaintiff Shauna suffers from

mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulbar palsy, inability to feed orally, decerebrate rigidity and gross physical deformity. It was alleged that Shauna's life expectancy is estimated to be four years.

Id. See Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 373 (Wis. 1975) ("The infant Tanya was born with deformities, mental retardation and anomalies because her mother had rubella during pregnancy.").

14. *See Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987) ("But for this negligence, the child allegedly would not have been born to experience the pain and suffering attributable to his affliction."); *see also Ellis v. Sherman*, 515 A.2d 1327, 1327 (Pa. 1986) ("The essence of the child's claim is that he was injured by being born, that nonexistence is preferable to a diseased life of suffering."); F. Allan Hanson, *Suits*

In *Zepeda v. Zepeda*,¹⁵ one of the first wrongful life claims,¹⁶ a child sued his father because the child had been born out of wedlock.¹⁷ The father had “induced the plaintiff’s mother to have sexual relations by promising to marry her,”¹⁸ even though the father was already married to someone else. The court described the defendant’s conduct as “willful and, perhaps, criminal,”¹⁹ leaving no doubt that the father had acted wrongfully. Further, the court made clear that the father’s act was a “legal wrong and a tortious act” against the child himself.²⁰

Even if the father had acted tortiously, however, this would not establish that the child had been *harmed* by the wrongful act. Yet, the court did not minimize the harm to the child, commenting that the “lot of a child born out of wedlock, who is not adopted or legitimized, is a hard one.”²¹ While the court suggested that as the child grew older he might “cherish his existence as much as, through his next friend, he now deplores it,”²² the court’s hopes that the child’s attitude might change did not affect its reasoning or its holding in the case.²³

Notwithstanding the *Zepeda* court’s having recognized that the father had wrongfully caused harm to his child and that the basic requirements for a tort—duty, breach, causation, and harm—had been met, the court was nonetheless reluctant to recognize an action for wrongful life.²⁴ The court understood that its own reluctance might be viewed as surprising, admitting that

for *Wrongful Life, Counterfactuals, and the Nonexistence Problem*, 5 S. CAL. INTERDISCIPLINARY L.J. 1, 2 (1996) (“Suits for wrongful life . . . are brought by or on behalf of disabled children themselves. Their claim is that but for the negligence of the defendant they would have been aborted, and thus they were harmed by being born.”); Janet L. Tucker, *Wrongful Life: A New Generation*, 27 J. FAM. L. 673, 673 (1988/1989) (“In a wrongful life action, the infant claims that had her defective condition been detected before birth, she would not have been born.”).

15. 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

16. See Dawe, *supra* note 3, at 473 (describing *Zepeda* as the “first cause of action for a so-called ‘wrongful life’”); Michael B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense of a Tort*, 62 FORDHAM L. REV. 1675, 1691 n.94 (1994) (describing *Zepeda* as an early wrongful life case); Morrissey, *supra* note 10, at 158 (“The first recorded case involving a wrongful life claim was *Zepeda v. Zepeda*.”).

17. *Zepeda*, 190 N.E.2d at 851 (“The plaintiff is the infant son of the defendant. He seeks damages from his father because he is an illegitimate child.”).

18. *Id.*

19. *Id.* at 852.

20. *Id.* at 855. See also *id.* at 857 (recognizing that the plaintiff had been injured by a tortious act).

21. *Id.* at 856.

22. *Id.* at 857.

23. See *infra* notes 26-31 and accompanying text (describing the court’s analysis in the case).

24. *Zepeda v. Zepeda*, 190 N.E.2d 849, 857-58 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

"it may be inconsistent to say, as we do, that the plaintiff has been injured by a tortious act and then to question, as we do, his right to maintain an action to recover for this act."²⁵ Nonetheless, the court thought it more prudent to recognize an action for wrongful life "only after thorough study of the consequences,"²⁶ which the court suggested would best be performed by the General Assembly.²⁷

Zepeda is helpful to consider both because it illustrates some of the features of the wrongful life claim and because it illustrates some of the misunderstandings that might arise about such a claim. For example, the *Zepeda* court seemed to believe that the recognition of an action for wrongful life in that case would somehow imply that "all others born into the world under conditions they might regard as adverse"²⁸ might then be entitled to bring an action. The court commented that it was "not the suits of illegitimates which give us concern, great in numbers as these may be."²⁹ Rather, the court's concern was that others might then be induced to bring less meritorious actions.³⁰ For example, one plaintiff "might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation."³¹ Yet,

25. *Id.*

26. *Id.* at 859. *But see* *Rivera v. New York*, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978) ("We similarly reject the view that courts should refrain from recognizing a cause of action such as this one unless and until the legislature does so. The fundamental principles of tort law were created by courts not legislatures.").

27. *See Zepeda*, 190 N.E.2d at 859.

28. *Id.* at 858. *See also* *Miller v. Duhart*, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) ("There are several reasons for declining to recognize the wrongful life tort in this case. First, it would be against public policy to recognize a cause of action which would encourage suits by 'all others born into the world under conditions they might regard as adverse.'" (quoting *Zepeda*, 190 N.E.2d at 858)).

29. *Zepeda v. Zepeda*, 190 N.E.2d 849, 858 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

30. *Id.* ("What does disturb us is the nature of the new action and the related suits which would be encouraged.").

31. *Id.* at 858. *See also* *Williams v. New York*, 223 N.E.2d 343, 344 (N.Y. 1966) ("Being born under one set of circumstance rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court."). Analogously, the North Carolina Supreme Court was reluctant to recognize an action for wrongful birth because it feared that a whole host of claims would be encouraged. *See Azzolino v. Dingfelder*, 337 S.E.2d 528, 535 (N.C. 1985). In *Azzolino*, the court asked:

When will parents in those jurisdictions be allowed to decide that their child is so "defective" that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physician civilly liable?
When a fetus is only the carrier of a deleterious gene and not itself impaired?
When the fetus is of one sex rather than the other?

Id.

the court failed to appreciate that the recognition of an action for wrongful life would not thereby entitle all individuals with less-than-perfect lives to seek compensation. First, the defendant in such a case would have to have acted *wrongfully* and, second, *harm* would have to have resulted from that wrongful action in order for liability to be imposed.³² Thus, it is simply false that recognizing an action for wrongful life would entitle anyone to bring an action whenever that person was dissatisfied with some aspect of his or her life.

Considering *Zepeda* might also lead to confusion regarding the conditions under which one might in fact have an action for wrongful life. The *Zepeda* court characterized the plaintiff as "protest[ing] not only the act which caused him to be born but birth itself."³³ Thus, on the court's view, the plaintiff was claiming that it would have been better never to have lived at all than to have lived as a person born out of wedlock.³⁴ Yet, it is not at all clear that this accurately captured the plaintiff's difficulty.³⁵ For example, if the father could have secured a divorce from his wife, he might then have married the child's mother and legitimated the child.³⁶ Thus, for Joseph Zepeda, at least three different scenarios might have been envisioned: (1) living as an illegitimate child, (2) living as a legitimate child, or (3) never having lived at all. Ironically, one of the first "wrongful life" cases did not really present the stark choice which such cases are thought to involve,³⁷ namely, living with the current affliction or never having lived at all.

32. See Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?* 22 U. BALT. L. REV. 185, 246 (1993) ("A claim for wrongful life will not be actionable under all circumstances. The child must first prove that her handicap is one which would justify her preference for nonexistence.").

33. *Zepeda*, 190 N.E.2d at 857.

34. See *id.* ("[T]he quintessence of this complaint is that he was born and that he is.").

35. Of course, the mischaracterization may well have been by the plaintiff's attorney rather than the court. See *infra* note 58.

36. See *Zepeda v. Zepeda*, 190 N.E.2d 849, 856 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964) (stating that if a child "is born of an adulterous relation he may be legitimated if his parents intermarry and his father acknowledges him to be his child").

37. See *Hanson*, *supra* note 14, at 2 (explaining that a wrongful life plaintiff's "claim is that but for the negligence of the defendant they would have been aborted, and thus they were harmed by being born"); see also *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987) ("But for this negligence, the child allegedly would not have been born to experience the pain and suffering attributable to his affliction."); *Ellis v. Sherman*, 515 A.2d 1327, 1327 (Pa. 1986) ("The essence of the child's claim is that he was injured by being born, that nonexistence is preferable to a diseased life of suffering."); *Tucker*, *supra* note 14, at 673 ("In a wrongful life action, the infant claims that had her defective condition been detected before birth, she would not have been born.").

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The point here should not be misunderstood. Even if the father could have married the child's mother, e.g., because his current wife had wanted a divorce³⁸ and the child's mother would have wanted to marry him notwithstanding his earlier deceit, that would not mean that the court could have *forced* him to marry the child's mother.³⁹ Further, it is not clear that it would have been wise for the court to impose damages for the father's having failed to divorce his current wife and marry the child's mother.⁴⁰ That, which is a separate question, requires a careful weighing of the relevant interests. The point here is merely that there were more possibilities than the *Zepeda* court seemed to have considered.

At common law, suits for damages resulting from a breach of a promise to marry were permitted,⁴¹ even if it was beyond the power of the courts to force the promisor to keep his promise. Thus, the fact that specific enforcement was not available would not have precluded the *Zepeda* court from awarding damages. Further, exemplary damages were sometimes awarded in actions involving a breach of promise to marry if "the defendant's promise was made with the willful intention of not keeping it,"⁴² the promise "was made from evil motives to secure the gratification of his personal desires,"⁴³ and the promise "was unjustifiably and wantonly broken under circumstances of humiliation and

38. Illinois had not yet adopted no-fault divorce. See Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241, 241 n.1 (stating that Illinois did not adopt no-fault divorce until the 1980s).

39. See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 327 n.149 (1988) ("[A]n agreement in the context of an intimate family relationship, like promises to marry, cannot be specifically enforced."). There is an additional difficulty posed where the person is already married. See *Owens v. Fanning*, 205 S.W. 69, 71 (Mo. Ct. App. 1918). The *Owens* court stated:

For the breach of such a contract [to marry the daughter] the father could maintain no action; and, in the instant case, no action could have been maintained by plaintiff's daughter upon such promise, since the promise, if made, was void for the reason that defendant was already married to another person.

Id.

40. See *infra* notes 49-57 and accompanying text.

41. See *McDonald v. Commissioner*, 9 B.T.A. 1340, 1340 (1928) (involving the tax liability of a woman who recovered a judgment of \$40,000 in an action against a man for breach of his promise to marry her); Carol Sanger, Essay, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 720 n.58 (1995) (suggesting that the "importance of marriage for women during the mid-19th century was further revealed by the substantial civil damages recovered by women in breach of promise-to-marry suits"); Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1025-27 (1995) (discussing damages that were awarded in breach of promise to marry actions).

42. *Drobnich v. Bach*, 198 N.W. 669, 669 (Minn. 1924).

43. *Id.*

degradation to the plaintiff.”⁴⁴ Circumstances of humiliation and degradation might have included giving birth to a child out-of-wedlock.⁴⁵

In *Zepeda*, the defendant (1) made a promise to the mother with the intention of not keeping it, (2) made the promise to induce her to have sexual relations with him, and (3) broke the promise under humiliating circumstances, namely, the mother would now have an illegitimate son to give birth to and raise. Thus, the facts in *Zepeda* might be thought to have warranted both compensatory and exemplary damages. Further, the *Zepeda* court suggested that the father’s having had sexual relations with the child’s mother after lying about his intent to marry her might not only have involved a breach of duty to her but also a breach of duty to his not-yet-conceived child.⁴⁶ Thus, the court might have justified imposing damages by suggesting that the child had at least an analog of a breach of promise action. Indeed, the *Zepeda* court seemed to have been considering the breach of promise paradigm, since it mentioned that a tort might have been committed upon the mother by the defendant’s having induced her to have intercourse with him by falsely promising marriage.⁴⁷ That issue, however, was not presented in the case at hand.⁴⁸

44. *Id.*

45. Indeed, the circumstances might be viewed as degrading and humiliating even if the child was stillborn. *See id.* at 670.

46. *See Zepeda v. Zepeda*, 190 N.E.2d 849, 855 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

47. *Id.* at 852. *See also* Piggott v. Miller, 557 S.W.2d 692 (Mo. Ct. App. 1977) (allowing woman to bring action against married man who had induced her to have sexual relations by promising to divorce his wife and marry her).

48. *See Zepeda*, 190 N.E.2d at 852.
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Many states have enacted statutes barring actions for breach of promise to marry,⁴⁹ in part because such actions were subject to abuse⁵⁰ and in part because it seems unwise to encourage an individual to enter into a marriage if there is good reason to believe that the marriage will not be successful. As the Utah Supreme Court explained, there is "no benefit in discouraging or penalizing persons who realize, before taking these vows, that for whatever reason, they are unprepared to take such an important step."⁵¹ The *Zepeda* court might have been reluctant to impose damages for some of these same reasons.⁵²

Zepeda involved an individual who had falsely promised to marry one person while he was already married to another. Courts have been quite reluctant to enforce breach of promise actions where one of the parties was

49. See ALA. CODE § 6-5-330 (1993) ("No contract to marry which shall be made within this state after September 7, 1935, shall operate to give rise, either within or without this state, to any cause of action for breach thereof."); COLO. REV. STAT. § 13-20-202 (1997) ("All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and seduction are hereby abolished."); CONN. GEN. STAT. §52-572b (1997) ("No action may be brought upon any cause arising from alienation of affections or from breach of a promise to marry."); DEL. CODE ANN. tit. 10, § 3924 (1975) ("No contract to marry made or entered into in this State shall operate to give rise, either within or without this State, to any cause or right of action for its breach."); FLA. STAT. ch. § 771.01 (1997) ("The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction or breach of contract to marry are hereby abolished."); ME. REV. STAT. tit. 14, § 854 (1980) ("No action or proceeding to recover damages for breach of promise to marry shall be maintained."); OHIO REV. CODE § 2305.29 (Anderson 1995) ("No person shall be liable in civil damages for any breach of a promise to marry . . ."); VA. CODE §8.01-220 (1992) ("No civil action shall lie or be maintained in this Commonwealth for . . . breach of promise to marry . . ."); see also Williams, *supra* note 41, at 1021 (noting that about half of the jurisdictions recognize the action in some form).

50. See *Miller v. Ratner*, 688 A.2d 976, 981 (Md. Ct. Spec. App. 1997) (stating that it was the public policy of the state to bar actions for breach of promise because such actions caused "extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing"); see also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 787 (1988) ("The claim for breach of a promise to marry, in particular, fell into disfavor. The Repeal movement was principally fueled by a perception that unscrupulous female plaintiffs abused the law by bringing unfounded claims against innocent men.").

51. *Jackson v. Brown*, 904 P.2d 685, 687 (Utah 1995).

52. See Lara Butler, Comment, *Torts—Cowe by Cowe v. Forum Group, Inc.: Wrongful Life and the Dilemma of Comparing Impaired Existence with Nonexistence*, 22 MEM. ST. U. L. REV. 881, 886 (1992) ("[R]ecognizing a tort for wrongful life may open up doors for fraudulent claims."). In a different context, the Alabama Supreme Court suggested that the possibility of fraud may not suffice as a justification for refusing to recognize a cause of action. See *Eich v. Town of Gulf Shores*, 300 So. 2d 354, 357-58 (Ala. 1974) ("As to the possibility of fraudulent claims, we believe that the interest of the plaintiff in having a cause of action far outweighs the theoretical possibility that recognition of this cause of action will open the door to fraudulent litigation.").

already married, since the law might then be viewed as inducing people to divorce. As a Louisiana appellate court explained, "the common law has universally recognized that promises of marriage, when made by persons already married, are unenforceable."⁵³ However, that court recognized that there is an exception to the common law rule, namely, *innocent* individuals should not be barred from collecting damages in these kinds of breach of promise cases.⁵⁴ Thus, if the person to whom the false promise was made did not know that the would-be spouse was already married, damages might be awarded.⁵⁵ Arguably, both Joseph Zepeda and his mother⁵⁶ should have been viewed as innocent parties who had been hurt by Joseph's father's deceitful promise.⁵⁷

The *Zepeda* court clearly believed that Joseph's father had tortiously harmed his not-yet-existing son, but was reluctant to recognize a wrongful life claim. The court might have held (but did not) that because the plaintiff was not claiming that he would have been better off never having lived at all but merely that he would have been better off as a legitimate child,⁵⁸ the plaintiff was not really making a wrongful life claim but was merely arguing that he was entitled to compensation because his father had refused to take the necessary steps to legitimate him. By adopting this approach, the *Zepeda* court would have found

53. *Sanders v. Gore*, 676 So. 2d 866, 870 (La. Ct. App. 1996).

54. *See id.* ("The only exception to this rule [barring recovery] arises when one of the parties successfully conceals his or her current marriage from an innocent party.").

55. The Utah Supreme Court reasoned that a false promise to marry in such circumstances might be viewed as sufficiently outrageous to merit damages for intentional infliction of emotional distress. *See Jackson*, 904 P.2d at 688. A separate question is whether someone should be classified as "innocent" if she believed her lover's promise that he would divorce his wife and then marry her. The Louisiana court suggested that such a person would not be innocent. *See Sanders*, 676 So. 2d at 870.

56. Joseph Zepeda's mother had not known that the man she was dating was married. *See Zepeda v. Zepeda*, 190 N.E.2d 849, 851 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

57. In other breach of promise cases, family members have been viewed as innocent parties. For example, in *Owens v. Fanning*, 205 S.W. 69 (Mo. Ct. App. 1918), a Missouri court allowed the father of a seduced seventeen-year-old (who knew that her seducer was married) to recover for loss of services and the "dishonor, mortification, and disgrace brought upon the plaintiff and his home." *Id.* at 71. The evidence supported that the daughter had been raped, *see id.* at 70, and then convinced by the defendant that because she now "could no longer hope to contract an honorable marriage," *see id.*, she should continue to "submit to him," especially since he would "obtain a divorce and marry her." *See id.* While the daughter was an innocent victim, the point here is that a family member, the father, was also viewed as "innocent" and deserving compensation.

58. It is unclear from the decision whether the attorney argued that recognition of the "plaintiff's claim means creation of a new tort: a cause of action for wrongful life," *see Zepeda*, 190 N.E.2d at 858, or whether this was a conclusion which the court reached notwithstanding the attorney's arguments to the contrary.

a way to award compensation without having been forced to recognize a claim for wrongful life,⁵⁹ which arguably was not at issue in the first place.

In some of the wrongful life cases based on illegitimacy, however, there clearly was neither a possibility of the child's parents' marrying nor of the father's (then) legitimating the child. Consider a case in which an incompetent woman is housed in a facility that negligently fails to protect her bodily integrity.⁶⁰ The woman might not only be raped (she would be unable to give consent) but a pregnancy might result. A child born of such a union might not only be illegitimate but might have other difficulties as well. For example, his or her biological parents might have been unable to raise him or her⁶¹ or might have failed to seek prenatal care.⁶²

Certainly, it might be argued that the damages associated with not being raised by one's biological parents⁶³ would not be sufficiently severe to warrant a wrongful life claim. Further, in today's world in which illegitimacy is no longer as burdensome as it once was,⁶⁴ it might seem especially implausible to

59. Of course, there would also be reasons not to recognize such an action, e.g., that courts might then be flooded with suits. *But see id.* at 857 ("It is not the suits of illegitimates that concern us, great in numbers as these may be.").

60. *See Foy v. Greenblott*, 190 Cal. Rptr. 84, 87 (Ct. App. 1983). In *Foy*, the court described the facts as follows:

Virgie Foy, an incompetent person, and Reffie Foy, her minor child, appeal from a judgment on demurrer dismissing an action by which damages were sought on allegations that Virgie became pregnant, and Reffie was born, because of negligence on the part of respondents Bradley Greenblott, M.D., Richard Slade, M.D., Ronald Diebel, M.D., San Jose Care and Guidance Center, and the County of Santa Clara.

Id. *See Cowe by Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 632 (Ind. 1991) ("Cowe was born on March 25, 1986, to Melanie Meredith, a lifelong, profoundly retarded adult in the total custodial care of the defendant's private nursing home."); *Williams v. New York*, 223 N.E.2d 343, 344 (N.Y. 1966) ("If the pleaded facts are true, the State was grievously neglectful as to the mother, and as a result the child may have to bear unfair burdens as have many other sons and daughters of shame and sorrow.").

61. *Foy*, 190 Cal. Rptr. at 94 ("It appears that the injury of which Reffie complains is simply that of being born to an incompetent mother who is unable to care properly for him."); *Cowe by Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 966 (Ind. Ct. App. 1989) ("[B]oth parents are so severely mentally or physically impaired as to render them incapable of affirmatively deciding to have a child or to care for a child . . ."), *rev'd*, 575 N.E.2d 630 (Ind. 1991).

62. *Cowe by Cowe*, 575 N.E.2d at 632 (claiming that the "failure to timely detect the pregnancy until its fifth month proximately caused a failure of proper prenatal care resulting in physical injury to Cowe, the extent of which is still undetermined").

63. *Id.* at 964 ("Jacob was subsequently adopted by Ann Cowe who is currently his parent and guardian.").

64. Even in 1963, the burdens imposed on illegitimates had been lessened. *See Zepeda v. Zepeda*, 190 N.E.2d 849, 859 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964) (recognizing the Illinois General Assembly "has been steadily whittling away at

claim that it would have been better never to have lived at all than to have lived as an illegitimate child.⁶⁵ Finally, even if a child could not become legitimated by his biological parents, he might become legitimate if, for example, he were adopted by someone else. For example, in *Cowe by Cowe v. Forum Group, Inc.*,⁶⁶ a child born as a result of the rape of "a lifelong, profoundly retarded adult . . . [with] only the mental capacity of an infant"⁶⁷ was adopted shortly after his birth,⁶⁸ thereby acquiring the same legal status as he would have had if he had been born into that adoptive family.⁶⁹

Yet, two issues should not be conflated: (1) whether an individual should be compensated for wrongful life where the claimed defect is based on his or her illegitimacy, and (2) whether wrongful life claims should ever be permitted. It may be that damages for a wrongful life claim based on illegitimacy should not be awarded. This could be either because the stark choice between living as an illegitimate or not living at all was not really presented and thus the action did not really involve a wrongful life claim or because, even if presented, living as an illegitimate is not plausibly thought to involve a condition worse than never having lived at all.⁷⁰ However, even if wrongful life claims solely based on illegitimacy should not be recognized, this would not establish that wrongful life claims in other contexts should also not be recognized.⁷¹

the legal handicaps shackling bastards and has given them rights almost equivalent to those born legitimate"). Since then, the United States Supreme Court has recognized that the class is protected by the Constitution. See *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that the denial of dependent, illegitimate children's right to recover for wrongful death of mother involves invidious discrimination).

65. *Williams v. New York*, 223 N.E.2d 343, 344 (N.Y. 1966) ("To uphold the present claim would be to say that being born out of wedlock in itself gives a right to damages and that the damages include compensation for the (supported or possible) disadvantages of illegitimate birth.").

66. 575 N.E.2d 630 (Ind. 1991).

67. *Id.* at 632.

68. *Id.*

69. See *Davis v. Fogle*, 23 N.E. 860, 861 (Ind. 1890) (holding that the legal status of adopted child is the same as that of the "natural" child).

70. See *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 494 (Ct. App. 1980), *overruled in part by Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) ("Illegitimacy is a status which may or may not prove to be a hindrance to one so born, depending on a multitude of other facts; it cannot be disputed that in present society such a circumstance, both socially and legally, no longer need present an overwhelming obstacle.").

71. See *id.* ("Surely there is a world of difference between an unwanted healthy child who is illegitimate, . . . and the severely deformed infant plaintiff, Shauna, in the case at bench.") (citing *Stills v. Gratton* 127 Cal. Rptr. 652 (Ct. App. 1976)).

IV. WRONGFUL LIFE VERSUS WRONGFUL BIRTH

Courts seem to have some difficulty in characterizing and analyzing wrongful life actions, at least in part, because they seem unsure how best to differentiate those actions from wrongful birth claims. For example, some suggest that the only difference between the two is who is bringing the claim—the child or the parent.⁷² Yet, this is inaccurate for a number of reasons.⁷³ The analysis of duty, breach, causation, and harm will differ in the two types of actions, even if the same set of underlying facts might be the basis of either claim.⁷⁴ While it may be that both the parent and the child should be able to bring an action against an individual whose negligence caused a child to be brought into this world to live a life of unbearable suffering, that is not because these different birth-related torts can only be differentiated in terms of who is bringing the action.

A. Duty and Breach

In a wrongful *birth* claim, the plaintiffs are the *parents*. It is relatively easy to establish that a physician owed them a duty to apprise them of the relevant information concerning a child they might produce⁷⁵ or, perhaps, a duty to

72. See *Arche v. United States Dept. of Army*, 798 P.2d 477, 479 (Kan. 1990) (“The tort of wrongful birth differs from the tort of wrongful life in that the suit is brought by the parents, who claim they would have avoided conception or terminated the pregnancy had they been properly advised of the risks or existence of birth defects to the potential child.”) (citing *Bruggeman v. Schimke*, 718 P.2d 635, 638 (Kan. 1986)); *Greco v. United States*, 893 P.2d 345, 347 (Nev. 1995) (“These kinds of tort claims have been termed ‘wrongful birth’ when brought by a parent and ‘wrongful life’ when brought on behalf of the child for the harm suffered by being born deformed.”); James M. Parker, Jr., Comment, *Wrongful Life: The Child’s Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY’S L.J. 639, 673 (1985) (“Wrongful life and wrongful birth are essentially the same actions, requiring the same consideration and elements; they merely have different plaintiffs.”); cf. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983) (“Wrongful life is the child’s equivalent of the parents’ wrongful birth action.”); Morrissey, *supra* note 10, at 158 (“A wrongful life claim is the child’s equivalent of the parents’ wrongful birth claim.”); Tucker, *supra* note 14, at 675 (“Wrongful life is the child’s equivalent of the parents’ wrongful birth action.”).

73. *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981) (noting that the considerations in an action for wrongful life and wrongful birth are “quite different”); Philip J. Van Derhoef, Recent Development, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis—Harbeson v. Parke-Davis, Inc.*, 58 WASH. L. REV. 649, 667 (1983) (“The two causes of action are different in injury, duty, and measure of harm.”).

74. Van Derhoef, *supra* note 73, at 649 (“Claims for wrongful birth and wrongful life often arise out of the same event: birth of a handicapped child.”).

75. See *Walker by Pizano v. Mart*, 790 P.2d 735, 739 (Ariz. 1990) (“A physician

perform the relevant medical procedure with reasonable care.⁷⁶ In a wrongful life claim, the plaintiff usually is a *child*⁷⁷ who in fact may not have existed at the time the tortious act took place,⁷⁸ and it might seem more difficult to establish that the physician had a duty to that not-yet-existing individual.⁷⁹ Yet, courts have not found this an insuperable difficulty. The Supreme Court of Louisiana suggested that sound public policy requires a "recognition of a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health care services to the child's parents."⁸⁰ The court explained, "When a

... has a duty to inform parents about fetal problems and risks."); *Harbeson*, 656 P.2d at 488 (noting that wrongful birth can "refer to an action based on an alleged breach of the duty of a health care provider to impart information . . . with due care, where the breach is a proximate cause of the birth of a defective child"); see also R. Keith Johnson, Note, *Medical Malpractice and "Wrongful Birth": A Critical Analysis of Wilson v. Kuenzi*, 57 UMKC L. REV. 337, 346 (1989) (stating that the duty breached in a wrongful birth action is the duty to provide the parents with the relevant information about their potential children).

76. See *Jackson v. Bumgardner*, 347 S.E.2d 743, 747 (N.C. 1986). In *Jackson*, [t]he complaint allege[d] that defendant completely failed to replace the IUD and further failed to warn plaintiff wife of this omission The complaint also allege[d] that defendant thereby breached his duty to her to exercise reasonable care and diligence in the application of his knowledge and skill in treating her.

Id. See *Harbeson*, 656 P.2d at 488 (noting that wrongful birth can "refer to an action based on an alleged breach of the duty of a health care provider to . . . perform medical procedures with due care, where the breach is a proximate cause of the birth of a defective child").

77. See Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 MINN. L. REV. 857, 909 n.83 (1994) ("In a wrongful life claim, if recognized, the defendants owe a duty of care to the child.").

78. *Lininger by Lininger v. Eisenbaum*, 764 P.2d 1202, 1209 (Colo. 1988) ("The underlying assumption of Pierce's claim for wrongful life is that a physician owes a duty to a child who might be born in the future . . ."); *Miller v. Duhart*, 637 S.W.2d 183, 187 (Mo. Ct. App. 1982). The *Miller* court commented:

In the case at bar, in order to rule negligence was properly pleaded on behalf of Dawon, this court would have to find a duty was owed to Dawon and that the breach of that duty was the proximate cause of his birth when both the duty allegedly owed and even the alleged breach arose before Dawon's conception.

Id.

79. See *Viccaro v. Milunsky*, 551 N.E.2d 8, 13 (Mass. 1990) ("On a theoretical basis, it is difficult to conclude that the defendant physician was in breach of any duty owed to Adam.").

80. *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1157 (La. 1988). See also *Harbeson v. Parke-Davis*, 656 P.2d 483, 495 (Wash. 1983) ("We now hold that a duty may extend to persons not yet conceived at the time of a negligent act or omission. Such a duty is limited, like any other duty, by the element of foreseeability.") (citing *Hunsley v. Giard*, 553 P.2d 1096, 1103 (Wash. 1976)).
<https://scholarship.law.missouri.edu/mlr/vol64/iss1/7>

physician knows or should know of the existence of an unreasonable risk that a child will be born with a birth defect, he owes a duty to the unconceived child as well as to its parents to exercise reasonable care in warning the potential parents and in assisting them to avoid the conception of the deformed child."⁸¹ By failing to warn the parents, the physician would be breaching a duty to the possibly not-yet-conceived child.⁸²

In *Renslow v. Mennonite Hospital*,⁸³ the Illinois Supreme Court considered whether a child (Leah), not yet conceived at the time negligent acts were committed against her mother (Emma), nonetheless had a cause of action against the tortfeasors for injuries resulting from their negligent conduct.⁸⁴ Basically, the defendants had transfused Emma with Rh-positive blood when she was thirteen years of age. Emma's blood was incompatible with and sensitized by that blood.⁸⁵ The sensitization of the mother's blood eventually caused prenatal damage to Leah, which included permanent damage to various organs and her nervous system.⁸⁶ The court suggested that there was a "right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."⁸⁷ Yet, the court's decision was not based on a breach of duty to the mother but instead on a breach of duty to the child.⁸⁸

In *Walker v. Rinck*,⁸⁹ the Supreme Court of Indiana considered whether the failure to appropriately treat a woman with Rh-negative blood after the birth of her first child created liability for the harm to her subsequent children resulting from that negligent failure.⁹⁰ The doctor argued that "he did not owe any duty to the Walker children because the physician-patient relationship never existed between them."⁹¹ The court admitted that "there was no direct physician-patient relationship between Dr. Rinck and the Walker children at the time he treated their mother."⁹² However, because it could "hardly be argued that the injuries suffered by the Walker children were not foreseeable when the medical reason to give RhoGAM to their mother was to prevent the exact injuries which . . .

81. *Pitre*, 530 So. 2d at 1157.

82. Wrongful life actions sometimes involve children who have already been conceived. See *infra* note 125 and accompanying text.

83. 367 N.E.2d 1250 (Ill. 1977).

84. See *id.* at 1251.

85. See *id.*

86. See *id.*

87. See *id.* at 1255.

88. See *id.*

89. 604 N.E.2d 591 (Ind. 1992).

90. See *id.* at 593 ("All three children filed their suits against defendants in December 1985, alleging that the defendants' negligence between October 1975 and the date of birth of their older sibling in June 1976 caused them to have the injuries set forth above.").

91. See *id.* at 594.

92. See *id.*

[allegedly] occurred,"⁹³ the court concluded that the physician owed the children a duty as well.⁹⁴

In *Monusko v. Postle*,⁹⁵ a child suffering from rubella syndrome brought an action against the physicians who failed to test for or immunize her mother against rubella.⁹⁶ The court pointed out that the plaintiff "would have been the beneficiary of a test and immunization procedure specifically designed to alleviate the harm which resulted in this case."⁹⁷ If Andrea's mother (Jill) had been immunized before Andrea's conception, Andrea would not have been born with rubella syndrome.⁹⁸ The court held that "defendants owed a duty to Andrea, even though she was not conceived at the time of the alleged wrongful act."⁹⁹

In *Jorgensen v. Meade Johnson Laboratories, Inc.*,¹⁰⁰ the Tenth Circuit Court of Appeals addressed whether one could have a duty to a not-yet-existing person. The court held that such a duty could exist. The court reasoned that "[i]f the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy."¹⁰¹ The *Zepeda* court offered an analogous example to suggest that a physician might owe a duty to a not-yet-existing child. "Suppose, before the child was conceived, a manufacturer negligently made a space heater and sold it to a retailer who retained it in his store. After the infant's birth his mother purchased the heater and used it in the room of her child who was burned because of its faulty preparation."¹⁰² The court explained that there of course would "be a right of action against the manufacturer despite the fact the negligence took place before the child was conceived."¹⁰³ To further support the plausibility of holding that an individual can have a duty to someone who does not yet exist, the *Zepeda* court offered another analogy. The court asked rhetorically, "If a child is born malformed or an imbecile because of the genetic effect on his father and mother of a

93. See *id.* at 595; see also *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495-96 (Wash. 1983) ("[A] duty may extend to persons not yet conceived at the time of a negligent act or omission. Such a duty is limited, like any other duty, by the element of foreseeability.").

94. See *Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992).

95. 437 N.W.2d 367 (Mich. Ct. App. 1989).

96. See *id.* at 368.

97. See *id.* at 370.

98. *Id.* at 369.

99. See *id.* at 370.

100. 483 F.2d 237 (10th Cir. 1973).

101. See *id.* at 240.

102. *Zepeda v. Zepeda*, 190 N.E.2d 849, 853 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964).

103. *Id.*

negligently or intentionally caused atomic explosion, will he be denied recovery because he was not in being at the time of the explosion?"¹⁰⁴

Many courts are willing to recognize a cause of action even if the plaintiff did not exist at the time the injurious act occurred.¹⁰⁵ However, it might be argued that the above analogies are faulty because, in each, the tortfeasor's act made the yet-to-be-conceived child's life worse than it otherwise would have been. In each of these actual or hypothesized situations, the appropriate comparison was or would be between the life of the child who had been harmed by the tortious act and the life of the child as it presumably would have been had no tortious act occurred.¹⁰⁶ In wrongful life cases, the appropriate comparison is between the life of the existing disabled child and nonexistence.

Yet, the point of the analogies above is not to establish that it is worse to live with a disability than not to live at all but merely to establish that one can have a duty to a not-yet-existing individual. Even if a duty to a not-yet-existing individual is breached, a number of other issues would have to be addressed before one could establish that wrongful life actions should be recognized. For example, one would have to establish that the breach in fact resulted in harm.¹⁰⁷ Thus, establishing that the concept of a duty to a foreseeable but not-yet-existing plaintiff is not incoherent is a necessary but not sufficient condition for establishing the existence of a wrongful life claim.¹⁰⁸

When suggesting that the duty prong of the wrongful life action cannot be met, some courts have concentrated on the *nature* of the duty rather than on the *identity* of the party to whom the duty is owed.¹⁰⁹ Thus, some courts and commentators have suggested that while there is nothing incoherent in owing a duty to a not-yet-conceived child, wrongful life actions cannot be recognized

104. *Id.* at 854.

105. *See* Dawe, *supra* note 3, at 477 ("[L]egal duties to an infant have been found to exist before birth, before viability, and even before conception.").

106. *See* Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 698 (Ill. 1987) ("In an ordinary prenatal-injury case, if the defendant had not been negligent, then the child would have been born healthy.").

107. *See infra* notes 154-263 and accompanying text.

108. Presiding Judge MacKenzie suggested that the notion that one can have a duty to a not-yet-existing plaintiff is incoherent. *See* Monusko v. Postle, 437 N.W.2d 367, 371 (Mich. Ct. App. 1989) (MacKenzie, J., dissenting) ("[W]hen defendants' alleged wrongful conduct took place, there was no relationship between defendants and the child upon which to predicate a duty owed to the child for the simple reason that the child did not exist.").

109. *See* Hummel v. Reiss, 608 A.2d 1341, 1347 (N.J. 1992) ("Dr. Reiss's . . . only duty to Kelly was to do all in his power to ensure her birth."); *cf.* Anthony Jackson, *Wrongful Life and Wrongful Birth: The English Conception*, 17 J. LEG. MED. 349, 352 (1996) ("Once it is established that there is no reason of principle that prevents the finding of a duty owed by the physician to the child in a wrongful life situation, the central question then becomes the nature of that duty.").

because there is no legal right not to be born,¹¹⁰ even if the alternative would involve being born into a life filled with hardship.¹¹¹

These courts and commentators are correct that there is no such right, just as there is no right to be born free of handicaps. However, the nonexistence of these rights does not have the significance that these courts and commentators seem to believe.¹¹² Further, if the nonexistence of the right not to be born or the right to be born free of handicaps did preclude wrongful life actions, then the nonexistence of those rights would also preclude other actions in tort *which have already been recognized*.

Suppose that a pregnant woman regularly goes to her obstetrician for prenatal care. Regrettably, the obstetrician fails to discover a condition which (a) should have been discovered, and (b) could have been corrected prenatally but cannot be corrected after birth.¹¹³ Suppose further that the child is now afflicted with that dread condition.

The child (through her next friend) sues the physician. The physician points out that the child does not have a right to be born free of handicaps. After all, the child would not have had a right not to have been born if, for example, that fetal condition had been undetectable.¹¹⁴ Or, suppose instead that the mother had been warned that the fetus had a noncorrectable condition and the mother nonetheless decided to carry the fetus to term. The child would not have a right not to have been born and could not have sued his or her mother for having failed to secure an abortion.¹¹⁵ There would be no cause of action in

110. See *Miller v. Duhart*, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) ("To recognize the 'wrongful life' tort we would be required to find that a child has a right not to be born.").

111. See *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992) ("There is no right to remain unborn."); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 700 (Ill. 1987) ("Because no right not to be born, even into a life of hardship, has ever been recognized in our judicial system, Adam Siemieniec has suffered no legally cognizable injury by being brought into existence afflicted with hemophilia."); *Bruggeman v. Schimke*, 718 P.2d 635, 642 (Kan. 1986) ("A legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law."); *Van Derhoef*, *supra* note 73, at 669 ("There is no apparent foundation for the child's right not to be born.").

112. See *infra* notes 113-23 and accompanying text.

113. See John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 470 (1996) (discussing situation in which "prenatal treatments are available that would correct a defect that is not otherwise correctable after birth").

114. See *supra* notes 30-32 and accompanying text (discussing the *Zepeda* court's worry that anyone dissatisfied would have had a cause of action).

115. See *Belsky*, *supra* note 32, at 241 ("Permitting children to maintain actions against their parents for wrongful life is unsound."); Bernadette Kennedy, Comment, *The Trend Toward Judicial Recognition of Wrongful Life: A Dissenting View*, 31 UCLA L. REV. 473, 497-98 (1983) ("Child-versus-parent claims will not necessarily follow from the recognition of wrongful life claims brought against physicians; and, according to

these and similar cases. Therefore, the physician might correctly argue that there is neither a right not to be born nor a right to be born free of handicaps.

An analogous argument might be offered in a context in which the child had not yet been conceived. Suppose that a woman goes to her obstetrician/gynecologist and informs the doctor that she and her husband are going to stop using birth control because they want to produce a child. The physician fails to test for or immunize the mother against rubella, even though doing so would have been standard procedure. Eventually, a child is born who suffers from rubella syndrome. The *child* sues the physician.¹¹⁶ The physician argues that because the child does not have a right to be born free of handicaps, the child does not have a cause of action.

In each of the cases above, a court might accept that a child does not have a right to be born free of handicaps but might nonetheless reject the physician's claim that he should not be held liable.¹¹⁷ Even if a child does not have a right to be born free of handicaps, the child might, in the words of the *Renslow* court, have a "right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother."¹¹⁸ Thus, the fact that the child does not have a general right to be born free of handicaps does not preclude the child's having a right not to be born with a handicap as a result of someone's negligence.

The claim here is not that the *Renslow* court's comments establish that wrongful life actions must be recognized, since those comments concerned the right to be *born* free of negligently caused prenatal injuries. Nonetheless, the *Renslow* court's comments are helpful to consider because they suggest that courts err when analyzing wrongful life actions in terms of whether there is a right not to be born. Just as an individual's not having a right to be born free of handicaps does not entail that physicians will be immune from liability if their

those advocates of the wrongful life tort, the realm of parental decision making will be left undisturbed."). *But see* *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488 (Ct. App. 1980), *overruled in part by* *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982). In *Curlender*, the court stated:

If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.

Id.

116. This case is based on *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989).

117. *See supra* notes 83-99 and accompanying text (discussing cases in which courts were willing to impose liability for pre-conception torts).

118. *See Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 1255 (Ill. 1977).

negligence causes someone to have to live with a handicap rather than live handicap-free, an individual's not having such a right does not entail that physicians will be immune from liability if their negligence causes someone to have to live a pain-filled life rather than not live at all.

In *Curlender v. Bio-Science Laboratories*,¹¹⁹ a California appellate court rejected the "notion that a 'wrongful-life' cause of action involves any attempted evaluation of a claimed right not to be born."¹²⁰ The court instead suggested that there is a "duty owed by medical laboratories engaged in genetic testing to parents and their as yet unborn children to use ordinary care in administration of available tests for the purpose of providing information concerning potential genetic defects in the unborn."¹²¹ If medical laboratories or professionals breach their duty to the child to apprise the parents of the relevant information and that breach results in the child's having to live a life of great suffering which would not have to have been lived but for that breach, those negligent individuals are potentially liable. Merely because the child does not have a general right not to be born does not preclude the child from having a more limited right to have his or her parents apprised of all of the relevant information. Presumably, the parents will act in the best interest of their potential child,¹²² even if that means preventing that potential child from having to endure a pain-filled existence by not carrying the fetus to term.¹²³

B. Causation

In wrongful life cases, the (alleged) negligence of a medical professional might have occurred either before or after conception had taken place. Thus, the

119. 165 Cal. Rptr. 477 (1980), *overruled in part* by *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982).

120. *Id.* at 496-97. In *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982), the California Supreme Court overturned *Curlender*, but only to the extent that it allowed general damages in wrongful life cases. See *Turpin*, 643 P.2d at 966.

121. *Curlender*, 165 Cal. Rptr. at 494. See also *Walker by Pizano v. Mart*, 790 P.2d 735, 739 (Ariz. 1990) ("Courts that have permitted a child's claim for wrongful life have found that the duty owed to the parent inures derivatively to the child.") (citing *Turpin*, 643 P.2d at 965; *Procanik v. Cillo*, 478 A.2d 755, 762 (N.J. 1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983)); *id.* ("We agree defendants owed such a duty in this case."). But see *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985) ("This duty to inform does not extend to the unborn child as it is the parents' decision to risk conception or to terminate a pregnancy.").

122. Cf. *Alexander Morgan Capron, Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 654 (1979) ("[T]he child is merely asserting that the decision whether the child would have been better off not having been born should be left with the child's 'parental guardians,' its parents.").

123. See *Belsky*, *supra* note 32, at 205 ("In the context of wrongful life and wrongful birth actions, . . . the ultimate concern throughout the treatment and decision-making processes is the well-being of the unborn.").

professional might have negligently failed to discover the high probability that any child conceived by a couple would have severe genetic defects¹²⁴ or, instead, might have failed to discover a severe genetic defect in an existing fetus.¹²⁵ In all of these cases, the professional might have failed to discover but *would not have caused* the (potential) condition.¹²⁶ Had the professional not been negligent, the parents either would not have conceived in the first place or would have aborted the fetus.¹²⁷ Thus, had there been no negligence, the child would not have existed at all.¹²⁸ The harm which results from negligent conduct in this kind of case is to be distinguished from that which occurs in a pre-conception tort.

Suppose that *prior to conception* a physician was negligent and that the negligence eventually caused a child to be born with an impairment. Had the physician not been negligent, the child would have been born impairment-free.

124. See *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 482 (Ct. App. 1980), *overruled in part by* *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (discussing failure to discover the likelihood that any child conceived by couple would be born with Tay-Sachs disease).

125. See *James. G. v. Caserta*, 332 S.E.2d 872, 879 (W.Va. 1985) (discussing physician who failed to perform amniocentesis which would have revealed birth defect).

126. See Thomas Keasler Foutz, Comment, "*Wrongful Life*": *The Right Not to Be Born*, 54 TUL. L. REV. 480, 485 (1980). Foutz commented:

[T]he claim is that the physician's negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.

Id.

127. See *Keel v. Banach*, 624 So. 2d 1022, 1027 (Ala. 1993). In *Keel*, the court held:

In order to establish causation, it is necessary for the plaintiff to show that, had the defendant not been negligent, the plaintiff would have been aware of the possibility that the child would be seriously defective, and either the child would not have been conceived or the pregnancy would have been terminated.

Id. See also *Smith v. Cote*, 513 A.2d 341, 343 (N.H. 1986) ("[T]he plaintiffs contend that if Linda had known of the risks involved she would have obtained a eugenic abortion."); *Naccash v. Burger*, 290 S.E.2d 825, 829 (Va. 1982) ("[B]ecause the Burgers received a negative Tay-Sachs report, they decided to continue the pregnancy rather than abort the fetus.").

128. See *Garrison v. Medical Ctr., Inc.*, 581 A.2d 288, 293 (Del. 1988) ("There may be a causal link between defendants' negligence and the child's existence, but not between that negligence and her impaired condition."); see also *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1154 (La. 1988) (commenting that in wrongful life actions, there "is no allegation that the physician's negligence directly caused the defect. Rather, it is alleged that the physician's negligent practice or failure to properly advise the parents has led to the birth of the child in the afflicted condition") (citing *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985)).

The physician would be sued for having committed a "pre-conception tort."¹²⁹ To determine the degree of harm, the trier of fact would compare the life of the disabled child with the life of an imagined, similarly situated, nondisabled child.

Courts distinguish wrongful birth actions from pre-conception torts by pointing out that in the former the negligent physician has not caused the *impairment* whereas in the latter he has.¹³⁰ In *Ellis v. Sherman*,¹³¹ the Supreme Court of Pennsylvania suggested that when "life comes into being unimpeded by outside forces, and is formed solely by its own internal controls, that life cannot be said to constitute an injury."¹³² The court was pointing out that the presence of undesirable characteristics does not alone constitute legal harm. An individual "is not injured by being born with poor vision, or by catching the flu, or by contracting cancer. These maladies . . . are unfortunate occurrences, but in the absence of circumstances in which the poor vision, the flu or the cancer are inflicted by the acts of another, these conditions are not legal injuries."¹³³ While such circumstances or characteristics are not desirable, "they are simply part of life."¹³⁴ The court explained, "Legal injury connotes interference from without; it connotes the disruption of internal controls . . . [rather than] the absence of interference in a natural process."¹³⁵ Thus, the Pennsylvania court seemed to imply that an individual who does not interfere with the body's natural processes will be immune from liability if an adverse result occurs.

The position suggested by the Pennsylvania Supreme Court would explain why a physician would be liable if he negligently performed fetal surgery resulting in harm, but a physician would not be liable if she negligently failed to diagnose a genetic birth defect. The physician in the first case would have caused the injury but the physician in the second case would have played no such causal role.

Yet, the position suggested by the Pennsylvania Supreme Court's comments does not and did not represent Pennsylvania tort law.¹³⁶ Consider a physician who has not *caused* a condition but, instead, has negligently failed to

129. See *Walker v. Rinck*, 604 N.E.2d 591, 593 (Ind. 1992).

130. *Turpin v. Sortini*, 643 P.2d 954, 961 (Cal. 1982). In *Turpin*, the court commented:

In an ordinary prenatal injury case, if the defendant had not been negligent, the child would have been born healthy In this case, by contrast, the obvious tragic fact is that . . . if defendants had performed their jobs properly, she would not have been born with hearing intact, but—according to the complaint—would not have been born at all.

Id.

131. 515 A.2d 1327 (Pa. 1986).

132. *Id.* at 1329.

133. *Id.*

134. *Id.*

135. *Id.*

136. See *infra* notes 137-44 and accompanying text.

discover it, resulting in a lost opportunity to correct that condition.¹³⁷ Were the court's position correct that legal injury "connotes the disruption of internal controls . . . [rather than] the absence of interference in a natural process,"¹³⁸ then this physician would not be liable. However, assuming that the patient would have opted to have the relevant procedure performed had she been fully informed,¹³⁹ the physician might be liable, notwithstanding the "absence of interference in a natural process."¹⁴⁰

The Pennsylvania Supreme Court has made clear that a negligent physician will not be immune from liability merely because he did not interfere with natural processes.¹⁴¹ Thus, the court presumably was not suggesting that the negligent noninterference with natural processes can never be actionable, but was merely indicating its unwillingness to impose liability in a case in which the only alternative would have involved the plaintiff's never having lived at all. The court pointed out that the "essence of the child's claim [was] that he was injured by being born, that nonexistence [was] preferable to a diseased life of suffering,"¹⁴² and the court was unwilling to impose liability for such an alleged injury. The Pennsylvania Legislature has since manifested its agreement with the court's position by passing a statute incorporating that view.¹⁴³

In a case in which the fetus has a genetic birth defect which itself is incurable,¹⁴⁴ the only options for the mother are to have an abortion or to carry the child to term. Some courts have suggested that it would be inappropriate to award damages in such a case because it would simply be too difficult to determine whether in fact the mother would have secured an abortion.¹⁴⁵ Yet,

137. See *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985) ("[T]he physician is not being charged with the failure to cure the birth defect, but rather with the failure to give the parents information about it so that an informed choice could be made.").

138. 515 A.2d 1327, 1329 (Pa. 1986).

139. The surgery might itself have risks which might convince the parents that it would not be worth doing, even if it would correct the difficulties the child might otherwise have.

140. See *supra* note 135 and accompanying text.

141. See *Jones v. Montefiore Hosp.*, 431 A.2d 920, 923 (Pa. 1981) (noting that physician could be held liable if his failure to diagnose breast cancer substantially contributed to the patient's harm).

142. *Ellis*, 515 A.2d at 1329.

143. See 42 PA. CONS. STAT. § 8305(b) (Supp. 1998) ("There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.").

144. See *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 375 (Wis. 1975) ("There is nothing the defendants did or could have done to alter the effects of rubella upon the unborn child.").

145. See *Wilson v. Kuenzi*, 751 S.W.2d 741, 745-46 (Mo. 1988). In *Wilson*, the court commented:

[T]he right to recovery is based solely on the woman testifying, long after the

there is no reason to believe that this could not be established¹⁴⁶ and, in any event, the failure to establish that an abortion would have taken place would simply mean that liability would not be imposed.¹⁴⁷

In some jurisdictions, the state legislature has made clear that no causes of action may be based on the fact that but for someone's negligence an abortion would have been secured.¹⁴⁸ However, such a law would not preclude all wrongful life actions, since such an action might be based on the fact that but for defendant's negligence the plaintiff would not have been conceived. Thus, a legislature might pass legislation specifying that the negligent failure to prevent conception is actionable even if the negligent failure to afford someone the opportunity to abort is not.¹⁴⁹ In such a state, an action for wrongful life might

fact and when it is in her financial interest to do so, that she would have chosen to abort if the physician had but told her of the amniocentesis test. The percentage of women who under pressure refuse to consider abortion, whether for reasons of religious belief, strong motherly instincts, or for other reasons, is sometimes astounding. It would seem that testimony either more verifiable based upon experience or more verifiable by some objective standard should be required as the basis for any action for substantial damages.

Id. See also Butler, *supra* note 52, at 886. Butler comments:

The claim for wrongful life is usually based on an assumption that the parents would have aborted the child had they been informed of the risk that their child would be impaired. There is a strong temptation for parents to testify that they would have exercised the option to abort had they known of the risks even if this would never have been their intent.

Butler, *supra* note 52, at 886. But see Johnson, *supra* note 75, at 346 ("To assert, as a matter of law, that it is impossible to know if a woman would want to have an abortion if she knew she would give birth to a seriously defective child is, at the very least, highly questionable.").

146. See Smith v. Cote, 513 A.2d 341, 347 (N.H. 1986) ("No logical obstacle precludes proof of causation in the instant case. Such proof is furnished if the plaintiff can show that, but for the defendants' negligent failure to inform her of the risks of bearing a child with birth defects, she would have obtained an abortion.") (citing Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981)).

147. See Rossi v. Somerset Ob-Gyn Ass'n, 879 F. Supp. 411, 416 (D.N.J. 1994) (dismissing the action because it could not be established by a preponderance of the evidence that the mother would have aborted if she had been apprised of the infant's prenatal condition).

148. See, e.g., MINN. STAT. § 145.424(1) (1998) ("No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted.").

149. Compare MINN. STAT. § 145.424(1) (1998), with MINN. STAT. § 145.424(3) (1998) ("Nothing in this section shall be construed to preclude a cause of action for . . . negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure . . ."). See also C.S. v. Nielson, 767 P.2d 504, 508 (Utah 1988) (construing a statute as precluding an action on the part of parents for having lost the opportunity to abort but as not precluding an action of the part

be maintained if a genetic counselor negligently failed to counsel parents about the high likelihood that any child they produced might have a genetic defect, although such an action could not be maintained if a physician failed to diagnose existing, noncorrectable abnormalities in a fetus.

Many, but not all, jurisdictions recognize wrongful birth actions¹⁵⁰ in which the parent claims that but for someone's negligence the impaired child would not have been born.¹⁵¹ Most jurisdictions recognizing wrongful birth actions do not also recognize wrongful life actions.¹⁵² A state recognizing wrongful birth but not wrongful life actions will be unable to justify its refusal to recognize wrongful life claims by arguing that it is against public policy to recognize an action whenever the only alternative would involve the child's not having been born. The legislature or court will have to offer a different rationale to justify its policy, e.g., by claiming that in wrongful life claims the harm prong of the tort has not been met.¹⁵³

C. Harm

Some courts have refused to award damages in wrongful life actions because they have been unwilling to hold that the child was actually harmed by the defendant's negligence,¹⁵⁴ perhaps believing that damages in wrongful life cases are too speculative.¹⁵⁵ However, as the Wisconsin Supreme Court has

of parents for having been deprived of the opportunity "to avoid pregnancy itself"). *But see* 42 PA. CONS. STAT. § 8305(b) (Supp. 1998) ("There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.").

150. *See Harbeson v. Parke-Davis*, 656 P.2d 483, 494 (Wash. 1983) ("[W]hereas wrongful birth actions have apparently been accepted by all jurisdictions to have considered the issue, wrongful life actions have been received with little favor.").

151. *Id.* at 488 (explaining that wrongful birth refers "to an action based on an alleged breach of the duty of a health care provider to impart information or perform medical procedures with due care, where the breach is a proximate cause of the birth of a defective child").

152. *See id.* at 494.

153. *See Dawe*, *supra* note 3, at 478 ("Injury has undoubtedly been the most troublesome element of a wrongful life suit for the courts."); *Fappiano*, *supra* note 11, at 226 ("In a wrongful life action, New York courts consistently deny recovery on the grounds that the impaired child did not suffer an injury.").

154. *See Johnson*, *supra* note 75, at 340 ("Proof of damages is the most controversial element in an action based on wrongful life.").

155. *See Ellis v. Sherman*, 515 A.2d 1327, 1329 (Pa. 1986) ("[W]e regard the assertion that the child has been injured by its existence as too speculative for us to determine."). *But see O'Grady v. Brown*, 654 S.W.2d 904, 911 (Mo. 1983) ("As a general principle, we think it unwise for courts to refuse to entertain suits simply because the plaintiff would have difficulty in proving his case.") (citing *Steggall v. Morris*, 258

suggested, juries are frequently called on to make damage assessments in other tort cases involving pain, suffering, and mental anguish.¹⁵⁶ Further, as the United States Supreme Court argued in *Story Parchment Co. v. Paterson Parchment Paper Co.*,¹⁵⁷ "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person."¹⁵⁸ Although pointing out that "damages may not be determined by mere speculation or guess,"¹⁵⁹ the Court suggested that it would "be enough if the evidence show[ed] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."¹⁶⁰ Thus, the Court suggested that a court should not be precluded from recognizing a particular cause of action, merely because the amount of damages might be difficult to ascertain.

In *Lininger by Lininger v. Eisenbaum*,¹⁶¹ the Colorado Supreme Court pointed out: "But for the physicians' alleged negligence, Pierce would have neither been burdened by the disadvantages of his impairment nor would he have experienced the benefits of life. He simply would not have existed."¹⁶² One of the issues before the court was whether the child had been harmed by the alleged negligence.

To determine that, the court first had to "value Pierce's present station in life,"¹⁶³ then "ascertain the value to Pierce of his not having been born,"¹⁶⁴ and finally "determine that the latter value is greater than the former."¹⁶⁵ The *Lininger* court suggested that it would be "impossible to complete those steps in any rational, principled manner,"¹⁶⁶ and refused to find that the child had

S.W.2d 577, 580 (Mo. 1953)).

156. See *Marciniak v. Lundborg*, 450 N.W.2d 243, 246 (Wis. 1990); see also Capron, *supra* note 122, at 649 ("Since the items to be measured in a 'wrongful life' case also appear in other settings, it is very hard to see how they are so uncertain as to justify the policy choice to forego the compensatory and deterrent functions of tort law for this particular wrong.").

157. 282 U.S. 555 (1931).

158. *Id.* at 563.

159. *Id.*

160. *Id.* See also *Smith v. Cote*, 513 A.2d 341, 347-48 (N.H. 1986) ("We have long held that difficulty in calculating damages is not a sufficient reason to deny recovery to an injured party.") (citing *Baker v. Dennis Brown Realty, Inc.*, 433 A.2d 1271, 1275 (N.H. 1981)).

161. 764 P.2d 1202 (Colo. 1988).

162. *Id.* at 1209.

163. *Id.* at 1210.

164. *Id.*

165. *Id.*

166. *Id.*

suffered a cognizable injury.¹⁶⁷ Because the child had “never had the opportunity to have been born completely healthy,”¹⁶⁸ the court believed the requisite comparisons were impossible.

Yet, comparisons will be difficult in any pre-natal tort action. Suppose, for example, that a physician negligently harmed a fetus in utero who eventually was born with an impairment resulting from that negligence. The trier of fact would have to speculate about what the child’s impaired life was and would be like, what the child’s unimpaired life would have been like, and then would have to compare the two. Because the Colorado court implied that it would have been able to make the required comparison had this been a pre-natal tort,¹⁶⁹ the court clearly was not merely worried about the kind of speculation which is generally involved in pre-natal tort actions.

When the Colorado court was suggesting that it could not calculate the relevant damages, the court was not merely suggesting that damages were “inherently too speculative to assess,”¹⁷⁰ but in addition was suggesting that a special kind of problem was implicated. The *Lininger* court explained, “The relevant question—of what value to Pierce would his non-existence have been?—is entirely too metaphysical to be understood within the confines of law, if indeed, the question has any meaning at all.”¹⁷¹ Ironically, the court’s view notwithstanding, that question is neither meaningless nor overly metaphysical.

Suppose, for example, that a competent adult is asked whether he would prefer never to have lived at all than to have lived his life and, if so, how much it would be worth to him to have that preference satisfied. Such a question would hardly be meaningless. Further, while many individuals would of course answer that they strongly preferred to have lived their lives, some not only would have a preference not to have lived at all but would also be willing to pay to have such a preference realized.¹⁷²

The point here is not that this would be the correct question to ask in the wrongful life context, since (1) an individual might prefer never to have lived at all because of the great mistakes that he *himself* had made, and (2) the individual’s assessment of how much the fulfillment of such a preference would be worth to him might depend upon how much money he had or upon whether

167. *Id.*

168. *Id.*

169. *See id.* (“Even if we could say with confidence that a life free of handicaps is measurably better than a life encumbered by impairments, we know of no means by which to assess the value of life without resort to such a comparison.”)

170. *Id.*

171. *Id.*

172. A separate question of course would be whether such a preference could be satisfied even if an agreement could be reached, since that might require that one could go back in time. Even were that not conceivable, *but see* H.G. WELLS, *THE TIME MACHINE* (1895), this would not preclude an individual’s thinking about how much he would be willing to pay to secure his never having lived at all.

he needed it for other purposes, *e.g.*, to save the greatly valued life of someone else. Nonetheless, such a question at least illustrates that it would be neither meaningless nor overly metaphysical to ask in the wrongful life context whether the child would have preferred never to have lived at all.¹⁷³

Perhaps it would be suggested that the adult responder in the above hypothetical would not and could not have all of the necessary information in order to answer intelligently, since he could not know enough about the proposed alternative involving his never having lived at all. However, the same point might be made about the individual who claims that she would be better off dead than enduring her present agony,¹⁷⁴ since that individual could not know enough about the proposed alternative involving her no longer being alive. Yet, the question and answer in the latter context are not only *not* viewed as meaningless but may have very important implications for whether that responder's life will continue.¹⁷⁵

The Delaware Supreme Court suggested that the "question of whether it would have been better for an impaired child to never have lived at all is a philosophical one not amenable to judicial resolution."¹⁷⁶ The New York Court of Appeals suggested, "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."¹⁷⁷ Certainly, it should not be

173. The difficulties posed by the child's not being competent to answer that question might be alleviated to some extent by appointing a guardian ad litem. For a discussion of the guardian's role in the right-to-die context, see *infra* notes 239-44 and accompanying text. Here, because the child would not be asking to die but would merely be asking for compensation, the issues posed by a lack of competency would seem to be much less worrisome.

174. See Belsky, *supra* note 32, at 227 ("A living patient who concludes that death is preferable to her life with disability has made a decision with no rational basis of knowledge to support it, since mortals know nothing more of death than what we conceptualize prior to its occurrence.").

175. For further discussion of the implications of right-to-die jurisprudence for wrongful life jurisprudence, see *infra* notes 230-57 and accompanying text.

176. Garrison v. Medical Ctr., Inc., 581 A.2d 288, 294 (Del. 1989).

177. Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978). See also Goldberg v. Ruskin, 499 N.E.2d 406, 409 (Ill. 1986). The *Goldberg* court commented:

The argument that the child was in some meaningful sense harmed by being born and would have been better off not being born suggests that there is a perspective, apart from our life and world, from which one can stand and say that he finds nonexistence preferable to existence. Determining whether an injury has occurred in these circumstances is a matter outside the competence of the legal system, for, as another court has said, whether it is better not to be born at all than to be born with even the most serious illness is a question more properly left to others.

Id. In *Greco v. United States*, 893 P.2d 345, 348 (Nev. 1995), the court stated:

Whether it is better never to have been born at all than to have been born with

<https://scholarship.law.missouri.edu/mlr/vol64/iss1/7>

surprising that these courts might *themselves* be reluctant to decide that living with a particular condition was worse than never having lived at all.¹⁷⁸ Such a decision might seem especially fact-driven and thus inappropriate for a state supreme court to decide.

These courts were not merely deferring to the trier of fact, but were refusing to recognize an action for wrongful life. They seemed to believe that by recognizing such an action they would be saying something important about the sanctity of life.¹⁷⁹ Yet, it is unclear just what would be said were the court to recognize an action for wrongful life. To say that a particular individual has been harmed by having been wrongfully brought into this world to live a life of suffering is hardly to say, for example, that no one with that person's characteristics should be allowed to live.¹⁸⁰ Nor is it to say that, the person's

even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Id. See also Kurtis J. Kearn, Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CALIF. L. REV. 1278, 1286 (1983) ("[T]o establish harm in a wrongful life action the court must compare the plaintiff's impaired condition with nonexistence, which would have been the plaintiff's condition had the defendant not acted negligently. No such comparison is possible because nonexistence is entirely outside of human experience.").

178. *Smith v. Cote*, 513 A.2d 341, 352 (N.H. 1986) ("[T]he courts of this State should not become involved in deciding whether a given person's life is or is not worthwhile."); *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967) ("A court cannot say what defects should prevent an embryo from being allowed life.").

179. See *Coleman v. Garrison*, 349 A.2d 8, 13 (Del. 1975) ("[T]he value of a human life outweighs any 'damage' which might be said to follow from the fact of birth."), *overruled by Garrison v. Medical Ctr., Inc.*, No. 193, 1989 WL 160433 (Del. Dec. 13, 1989); *Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984) ("Basic to our culture is the precept that life is precious."); *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979) ("One of the most deeply held beliefs of our society is that life whether experienced with or without a major physical handicap is more precious than non-life.") (citing *In re Quinlan*, 355 A.2d 647, 651-52 n.1 (N.J. 1976)); *Van Derhoef*, *supra* note 73, at 663-64 ("[T]he courts have reasoned that recognizing a duty to the unborn child to prevent its birth with defects represents a 'disavowal' of the sanctity of life, thus going against one of society's most deeply held beliefs: that life in any condition is more precious than non-life.").

180. *But see Kennedy*, *supra* note 115, at 496 ("If a child is born in such a defective condition that his or her value as a human being is in question, euthanasia of the child at birth may logically be justified.").

own view notwithstanding,¹⁸¹ such a person would not have a life worth living.¹⁸²

One misconception about the wrongful life plaintiff is that he or she must now wish to die.¹⁸³ While that may in fact be true of particular plaintiffs, the wrongful life action itself entails no such desire. For example, suppose that an individual had several horrific years of suffering and now is expected to live relatively pain-free for at most another year. The next year might make up for *some* of the past suffering, even if *on balance* the person would have been better never having lived at all.¹⁸⁴ This individual might hang onto the last remaining months tenaciously and might reject any opportunity to die sooner than his condition required. Of course, a different individual might have been living in excruciating pain for his entire life¹⁸⁵ and might claim *both* that it would have been better never to have lived and that it would be better not to have to continue to live.¹⁸⁶ The wrongful life action, however, does not entail such a position.

An action for wrongful life is neither an action for specific performance (were that possible) nor an action requesting to be allowed to die. Rather, it is

181. The New Hampshire Supreme Court suggested that in wrongful life cases, the "necessary inquiry is objective, not subjective," as if it would not matter what the impaired individual thought about her own life. *Smith v. Cote*, 513 A.2d 341, 353 (N.H. 1986).

182. *Cf. Coleman v. Garrison*, 327 A.2d 757, 761 (Del. Super. Ct. 1974) ("To make such a determination would, indeed, raise the unfortunate prospect of ruling, as a matter of law, that under certain circumstances a child would not be worth the trouble and expense necessary to bring him into the world."); *Ellis v. Sherman*, 515 A.2d 1327, 1329 (Pa. 1986) ("It cannot escape our judicial notice that many diseased and deformed persons live contented lives and make significant social and personal contributions."); Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 535 (1991). Kelly comments:

Although courts state their policy concerns in a variety of ways, they all essentially balk at making the fundamental comparison between life with severe impairments and no life at all. Courts feel that permitting a child to recover on such a claim amounts to a judicial decree that handicapped life is not worth living.

Id.

183. *See Capron, supra* note 122, at 654 ("The child is neither espousing the view that a person with impairments does not deserve the law's full protection nor making an implicit request for euthanasia.").

184. *Cf. Philip G. Peters, Jr., Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 499 (1989) ("Balancing the burdens of life against the benefits, the child may conclude that nonexistence would be preferable.").

185. *See Speck v. Finegold*, 439 A.2d 110, 115 (Pa. 1981) ("[W]hen existence is foreseeably and inextricably coupled with a disease, such an existence, depending upon the nature of the disease, may be intolerably burdensome.").

186. *See Peters, Jr., supra* note 184, at 502 ("If the long-run burdens of life, such as the pain associated with a congenital affliction, outweigh the benefits of life, then a person can rationally prefer not to exist at all.").

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merely an action to secure monetary damages. As the California Supreme Court has suggested, "it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."¹⁸⁷

A state supreme court's recognizing an action for wrongful life would merely mean that certain conditions might be the basis for such an action and that the trier of fact would be permitted to decide whether in fact wrongful life damages should be awarded. The California Supreme Court suggested that in a case in which the "plaintiff's only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all."¹⁸⁸ However, other wrongful life cases involve children with "much more serious, debilitating and painful conditions,"¹⁸⁹ and a jury might well decide in such a case that it would have been better never to have lived at all.

The claim here is not that recognizing a claim for wrongful life would allow anyone who had been brought into the world as a result of someone's negligence to have a trier of fact decide whether compensation should be awarded, no matter how minor the perceived defect. On the contrary, a court or legislature might recognize a cause of action for wrongful life but establish as a matter of law that certain conditions, *e.g.*, illegitimacy, could not be the basis of such an action.¹⁹⁰ Further, even if a particular condition *could* be the basis of a wrongful life claim, that would not entail that a jury in a particular case would find that a particular individual would have been better off never having lived. A jury might find that the symptoms of an illness suffered by that individual were not sufficiently severe to warrant wrongful life damages, even though someone else with much more severe symptoms of that same illness might indeed have deserved compensation.

Many courts have not only been unwilling to decide that a particular individual would have been better off never having lived but have also refused to allow a jury to make that determination.¹⁹¹ Consider the rationale offered by

187. *Turpin v. Sortini*, 643 P.2d 954, 961-62 (Cal. 1982).

188. *Id.* at 962.

189. *Id.* at 962-63.

190. *See Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 486 (Ct. App. 1980), *overruled in part by Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) ("[I]t cannot be disputed that in present society such a circumstance [illegitimacy], both socially and legally, no longer need present an overwhelming obstacle.").

191. *See, e.g., Eisbrenner v. Stanley*, 308 N.W.2d 209, 213 (Mich. Ct. App. 1981) ("We believe the comparison between nonexistence and deformed life is necessary but impossible to make and juries should not be allowed to speculate on the child's damages."); *see also Garrison v. Garrison v. Medical Ctr.*, No. 193, 1989 WL 160433, at *3 (Del. Dec. 13, 1989). In *Garrison*, the court held:

[N]o cause of action lies on behalf of either the parents or the child based on

the New York Court of Appeals for not recognizing wrongful life claims—that doing so would contradict the societal position on the value of life.¹⁹² Yet, if that were really the difficulty and if the jury is supposed to represent society,¹⁹³ then one would expect that allowing such a decision to go to the jury would not result in a serious misrepresentation of society's views.¹⁹⁴ The California Supreme Court suggested that it could not “assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.”¹⁹⁵ The more plausible explanation for the New York

a purported claim or cause of action against defendants for “wrongful life” or any such claim premised on the assertion that defendants’ negligence deprived the child’s parents of the opportunity to accept or reject the child’s birth.

Id. See *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 702 (Ill. 1987) (“We therefore hold that claims for relief for the wrongful life of congenitally or genetically defective children should not be recognized in this State absent clear legislative guidance.”); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 530 (N.C. 1985) (“We conclude that neither the parents’ claim for relief for ‘wrongful birth,’ the child’s claim for ‘wrongful life’ nor the siblings’ claim presents a claim upon which relief can be granted.”); *Beardsley v. Wierdsma*, 650 P.2d 288, 289 (Wyo. 1982) (“The ‘wrongful life’ action asserted by the parents on behalf of their children is an action for damages based on appellees’ negligence which caused a particular child to be born. We hold that a cause of action for ‘wrongful life’ under the circumstances here does not exist.”).

192. See *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) (“Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.”); see also *Butler*, *supra* note 52, at 886 (“[A] life with defects is preferable to no life at all.”).

193. A separate question is whether the jurors could apply the law, but there are remedies for that difficulty. See *In re Medical Review Panel*, 657 So. 2d 713 (La. Ct. App. 1995) (disqualifying jurors because of perceived inability to apply the law and award damages for wrongful conception even if such damages would be appropriate).

194. See Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1163 n.205 (1997) (“[T]he jury is meant to represent and act upon [society’s] values.”); Jeffrey J. Rachlinski, Introduction, *Juries: Arbiters or Arbitrary*, 7 CORNELL J.L. & PUB. POL’Y 1, 2 (1997) (explaining that the jury “simultaneously exists to reflect community values and to represent the diverse perspectives in our society”); Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 991 (1998) (discussing “modern requirement that jury pools represent a fair cross-section of society”). But see Bonnie Kae Grover, Essay, *Left-Right Critiques of the American Judicial System: Resetting the Social Agenda*, 3 VA. J. SOC. POL’Y & L. 371, 379 (1996) (“Other scholars on the left argue that juries cannot be trusted to preserve minority rights, since they almost always represent forces of the dominant society.”).

195. *Turpin v. Sortini*, 643 P.2d 954, 963 (Cal. 1982). At one point, the New Jersey Supreme Court was confident that life would always be chosen. See *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967), *overruled by Berman v. Allan*, 404 A.2d 8 (N.J. 1979). In *Gleitman*, the court remarked:

It is basic to the human condition to seek life and hold on to it however
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court's refusal to allow juries to award wrongful life damages in particular cases is that, court claims to the contrary notwithstanding, the societal position is that such compensation should be awarded in certain circumstances and the court worried that juries might in fact do so occasionally.

Some courts have refused to recognize wrongful life claims because they claimed not to know (and that a jury could not know) the appropriate value to assign to nonexistence. The Florida Supreme Court asked rhetorically, "How do we assign a 'value' to nonexistence, to nothingness?"¹⁹⁶ The Colorado Supreme Court explained that because the court could not assign a value to the child's nonexistence,¹⁹⁷ the court could not calculate the damages.¹⁹⁸

Yet, it is not immediately clear why a "value" could not be assigned to nonexistence, *e.g.*, a value of zero.¹⁹⁹ Presumably, the real issue for these courts was the appropriate value to assign to *existence* rather than to *nonexistence*.²⁰⁰ Even that, however, may be a misleading way to look at the relevant issue since the positive value of existence *per se* is not questioned by the wrongful life

heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all.

Id. See also Kelly, *supra* note 182, at 514 ("Society, and judges as members of society, instinctively values human life, even life with handicaps, above all else. That cherished value generates an intuitive reaction that an impaired life is better than no life at all."). The New Jersey Supreme Court has since recognized wrongful life actions. See Procanik v. Cillo, 478 A.2d 755 (N.J. 1984).

196. *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992). See also Van Derhoef, *supra* note 73, at 667 ("In wrongful life claims, however, birth can be determined to be an injury to the child only by comparing a known situation with an unknown situation: life with birth defects and nonexistence.").

197. *Lininger by Lininger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988).

198. *Id.* See also *Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984) ("[T]he impossibility of measuring damages would in any event preclude recognition of the cause of action."); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 697 (Ill. 1987) (discussing "the difficulty, if not impossibility, of measuring appropriate damages"); *Miller v. Duhart*, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) ("[I]t is impossible to ascertain damages for a 'wrongful life.'"); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 376 n.5 (Wis. 1975) ("The damages claimed cannot be measured by any standards recognized by our law.").

199. See Dawe, *supra* note 3, at 496 (offering proposed scheme in which "[n]onexistence would be valued at zero, while life without defects would retain its high positive value. Life impaired with defects would be assigned values in a range spanning from positive numbers just below that assigned to life without defects, down to negative values for the most serious of impairments").

200. See *Anderson v. St. Francis-St. George Hosp., Inc.*, 671 N.E.2d 225, 228 (Ohio 1996) ("This court has recognized 'the impossibility of a jury placing a price tag' on the benefit of life.") (citing *Johnson v. University Hosps.*, 540 N.E.2d 1370, 1378 (Ohio 1989)).

plaintiff. Rather, the positive value of existence with a terrible affliction is what is at issue. Just as individuals who refuse life-saving treatment need not question the value of life and indeed "may fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs, and without protracted suffering,"²⁰¹ the wrongful life plaintiff need not be questioning the value of life but merely asserting that life with a terrible affliction can be worse than not having lived at all.

The Florida and Colorado Supreme Courts might have been making either of two different claims: (1) it is impossible to fix a particular value on never having existed rather than on having lived a pain-filled life, and thus it would be impossible to say just how preferable the former option might be in a particular case, or (2) it is impossible to make any value assignments whatsoever in these kinds of cases and therefore impossible to say whether it would have been better not to have existed at all than to have lived a pain-filled life. The latter is a much stronger claim than the former.

In *Harbeson v. Parke-Davis, Inc.*,²⁰² the Washington Supreme Court argued that "measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors,"²⁰³ concluding therefore that general damages were "beyond computation."²⁰⁴ However, the court pointed out that "one of the consequences of the birth of the child who claims wrongful life is the incurring of extraordinary expenses for medical care and special training."²⁰⁵ The court suggested that these expenses were calculable²⁰⁶ and that special damages could be awarded in wrongful life cases.²⁰⁷

Other courts have considered whether special damages may be awarded in wrongful life actions but have concluded that such damages should be awarded in wrongful birth actions instead.²⁰⁸ However, that position has certain

201. See *In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985); see also *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 223 (Ct. App. 1984) ("He wanted to live but preferred death to his intolerable life on the ventilator.").

202. 656 P.2d 483 (Wash. 1983).

203. *Id.* at 496.

204. *Id.* See also *Goldberg v. Ruskin*, 499 N.E.2d 406, 409 (Ill. 1986) ("[T]he objection underlying the general refusal to permit a child to recover general damages is the impossibility of entering the shadow world implicit in the suggested comparison of life with nonlife."); *Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984) ("Whatever theoretical appeal one might find in recognizing a claim for pain and suffering is outweighed by the essentially irrational and unpredictable nature of that claim. Although damages in a personal injury action need not be calculated with mathematical precision, they require at their base some modicum of rationality.").

205. *Harbeson*, 656 P.2d at 496.

206. *Id.*

207. *Id.* at 496-97.

208. *Kush v. Lloyd*, 616 So. 2d 415, 423-24 (Fla. 1992). In *Kush*, the court held: These expenses are not properly an aspect of a wrongful life claim at all, but an aspect of wrongful birth. Such damages are quantifiable with reasonable

drawbacks. Wrongful birth actions are designed to compensate parents for their losses.²⁰⁹ If the parents are only responsible for the child until she reaches majority,²¹⁰ then the special expenses required for her care after majority would fall onto the child or the state.²¹¹ By refusing to allow a wrongful life claim, the court or legislature may be precluding the child from obtaining the funds necessary to keep her alive, much less compensation for the other burdens she has wrongfully been forced to bear. Further, it is not as if the tortfeasor would be treated unfairly by being forced to pay these costs. If indeed the pre-majority costs are not unfairly assessed in a wrongful birth action,²¹² the post-majority

certainty We thus find no inconsistency in extending the tort of wrongful birth to encompass all extraordinary expenses caused by the impairing condition for the duration of the child's life expectancy.

Id. (citing *Fassoulas v. Ramey*, 450 So. 2d 822, 824 (Fla. 1984)). See also *Butler*, *supra* note 52, at 886 ("[T]he child will be compensated indirectly by the parents' recovery in other causes of action"); Philip G. Peters, Jr., *The Illusion of Autonomy at the End of Life: Unconsented Life Support and the Wrongful Life Analogy*, 45 UCLA L. REV. 673, 709 (1998). Peters, Jr., recognized:

Through their wrongful birth actions, parents can recover the extraordinary costs of raising a child with a disability and, in some states, their ordinary child support costs as well. This indirect protection of the child makes recognition of an independent wrongful life action in the name of the child less essential.

Id.

209. See *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984) (recognizing that wrongful birth actions "reflect a policy of compensating parents for both pecuniary loss and emotional injury").

210. See *Bani-Esraili v. Lerman*, 505 N.E.2d 947, 948 (N.Y. 1987). In *Bani-Esraili*, the court held:

In this wrongful birth action, the trial court properly held that plaintiff could not recover from the estate of defendant doctor the costs of those extraordinary expenses which plaintiff might incur for the continued support and special care of his son, born with thalassemia major, after the child reaches the age of 21. Under New York law, a parent has no legal obligation to continue the support of a child after majority

Id.

211. *Viccaro v. Milunsky*, 551 N.E.2d 8, 13 (Mass. 1990). In *Viccaro*, the court commented:

We do not know Adam's life expectancy nor whether he has a reasonable prospect of supporting himself in adulthood. We do not totally discount the possibility that we might impose liability for the extraordinary expenses of caring for a person like Adam after his parents' deaths, perhaps in order to keep such a person from being a public charge.

Id.

212. See *Kush*, 616 So. 2d at 424 ("We thus find no inconsistency in extending the tort of wrongful birth to encompass all extraordinary expenses caused by the impairing condition for the duration of the child's life expectancy. Justice strongly favors such an extension, and we find no countervailing policy.").

costs are not unfairly assessed in a wrongful life action.²¹³ Further, steps could be taken to assure that the defendant would not be paying the same award twice, once in a wrongful life action and again in a wrongful birth action.²¹⁴

In *Procanik v. Cillo*,²¹⁵ wrongful birth damages could not be awarded because the statute of limitations had run.²¹⁶ The court recognized a wrongful life action in that case, making clear that the court's decision "to allow the recovery of extraordinary medical expenses [was] not premised on the concept that non-life is preferable to an impaired life, but [was] predicated on the needs of the living."²¹⁷ Thus, because the medical expenses of such a child were both real and determinable,²¹⁸ and because the parents could not press their claim,²¹⁹ the court allowed recovery for wrongful life.

Merely because a person must incur great expense in order to stay alive (and has incurred those costs since birth) neither entails that it would be better for that person not to continue living nor that the person was harmed by having been born.²²⁰ The Colorado Supreme Court claimed that the fundamental

213. See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983) ("[W]e prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.").

214. See *Procanik v. Cillo*, 478 A.2d 755, 761 (N.J. 1984) (discussing recovery of the costs of "extraordinary medical expenses by either the parents or the infant, but not both"). Some commentators seem not to have appreciated this point. See *Butler*, *supra* note 52, at 886. *Butler* writes:

If a separate tort of wrongful life were established, the defendant might be subject to two suits—one by the parents for wrongful birth and one by the parents on behalf of the child for wrongful life. Thus, the parents might receive double recovery which would be unfair to the defendant.

Butler, *supra* note 52, at 886.

215. 478 A.2d 755 (N.J. 1984).

216. *Id.* at 762.

217. *Id.* at 763.

218. See *id.* at 761 (suggesting that the extraordinary medical expenses are predictable and certain); see also *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 488 (Ct. App. 1980), *overruled in part by* *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) ("The reality of the 'wrongful-life' concept is that such a plaintiff both exists and suffers, due to the negligence of others."); *Hanson*, *supra* note 14, at 6 (refusing to recognize wrongful life claims involves turning "a blind eye to considerations of compassion and fairness for plaintiffs who must live with birth defects attributable to negligent conduct"); *Kelly*, *supra* note 182, at 520 ("The pecuniary loss and pain and suffering are real and determinable. Juries can imagine them readily and can reach an appropriate award."); *Tucker*, *supra* note 14, at 685 ("The reality of the 'wrongful life' concept is that such a plaintiff both exists and suffers, due to the negligence of others.").

219. There was still a possibility that the parents might recover expenses by suing their attorney for legal malpractice. See *Procanik*, 478 A.2d at 762.

220. *Kearl*, *supra* note 177, at 1290 ("[T]he existence of burdensome expenses does not prove that she has been harmed.").

problem with the wrongful life claim was that the court could not determine in the first instance that the child had been injured.²²¹ Yet, if it is impossible to say whether it would be better to be alive than not to exist, then it would seem that wrongful death actions should not be recognized, since it would be impossible to establish that the individual had been harmed by having had her life end prematurely.²²² After all, the person might have been benefited by having received her “just” rewards earlier rather than later.

The claim here is not that courts or legislatures should deny recovery for wrongful death in those instances in which it seemed “reasonable” to believe that the person had not been harmed because she had gone to heaven.²²³ Nor is the claim that an evil individual should receive *more* compensation for wrongful death because it seemed “reasonable” to believe that he had been forced to go to hell prematurely. Rather, it is merely that considerations of whether there is an afterlife and what such a life would be like do not affect or preclude recovery in other areas of tort and there is no reason that analogous considerations should have such a role in the wrongful life context.

Two issues should not be conflated: (1) whether causing someone’s death without that person’s consent involves a harm, and (2) what damages should be awarded for that harm. Some jurisdictions restrict recovery in wrongful death cases to pecuniary damages²²⁴ while others do not.²²⁵ Yet, regardless of how

221. *Lininger by Lininger v. Eisnebaum*, 764 P.2d 1202, 1210 (Colo. 1988). See also *Turpin v. Sorcini*, 643 P.2d 954, 963 (Cal. 1982). In *Turpin*, the court stated: In the first place, the problem is not—as it was in *Story Parchment*—simply the fixing of damages for a conceded injury, but the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all.

Id.

222. *Cf. Capron*, *supra* note 122, at 650 (commenting that if nonexistence “cannot be measured how is one to know whether life is always more valuable?”).

223. See *Kelly*, *supra* note 182, at 520-21 (suggesting that courts do not consider the quality of the afterlife when compensation is at issue).

224. See *Rivera v. New York*, 404 N.Y.S.2d 950, 953 (Ct. Cl. 1978) (stating that in wrongful death action, “the law does not give compensation for the death itself, but rather for the pecuniary loss which results from it”); *Kearl*, *supra* note 177, at 1295 (“[T]he measure of damages is simply the loss to the survivors or to the deceased’s estate of the financial contributions that the deceased would have made during his or her working life.”).

225. See ALASKA STAT. § 09.55.580(c) (1996). Alaska law provides: In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

- (3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;
- (4) loss of consortium;
- (5) loss of prospective training and education;
- (6) medical and funeral expenses.

See ARK. CODE ANN. § 16-62-102 (f)(1) (Michie Supp. 1992) ("The jury . . . may fix such damages as will be fair and just compensation for pecuniary injuries, including a spouse's loss of the services and companionship of a deceased spouse and any mental anguish resulting from the death to the surviving spouse and beneficiaries of the deceased person."); ARK. CODE ANN. §16-62-102 (f)(2) (Michie Supp. 1992) ("When mental anguish is claimed as a measure of damages under this section, mental anguish will include grief normally associated with the loss of a loved one."); DEL. CODE tit.10, § 3724(d) (1996). Delaware law provides that in determining the amount of the award, the court or the jury may consider the following:

- (1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries that would have resulted from the continued life of the deceased;
- (2) Loss of contributions for support;
- (3) Loss of parental, marital and household services, including the reasonable cost of providing for the care of minor children;
- (4) Reasonable funeral expenses not to exceed \$2,000;
- (5) Mental anguish resulting from such death to the surviving spouse and next of kin of such deceased person.

See ME. REV. STAT. tit. 18, § 2-804(b) (1998). Maine law provides:

The jury may give such damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death to the persons for whose benefit the action is brought and in addition shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition may give damages not exceeding \$150,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought, and in addition may give punitive damages not exceeding \$75,000"

See MD. CODE CTS & JUD. PROC. § 3-904 (d) (Supp. 1997) ("[Damages] are not limited or restricted by the 'pecuniary loss' or pecuniary benefit' rule but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education"); MASS. GEN. LAWS Ch. 229 § 2 (Supp. 1998). Massachusetts law provides:

A person who causes the wrongful death of another shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered . . . including but not limited to compensation for the loss of the reasonably expected income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such

damages are to be measured, the victim should have been *harm*ed in order for liability to be appropriately imposed. Were it impossible to decide in the first instance whether someone had been harmed by having been deprived of her life, it would seem that wrongful life damages should not be awarded.

Once harm has been established, the appropriate measure of damages is a separate issue which need not exactly reflect the harm suffered, as is demonstrated by how wrongful death damages are calculated.²²⁶ Presumably, no one would claim that the *value* of the deceased person's life would correspond to the wrongful death damages, especially when restricted to pecuniary losses. Further, as a separate point, the trier of fact does not attempt to ascertain the value of existence *per se* so that it can *increase* the wrongful death award.

The existence of wrongful death actions (despite possible difficulties in ascertaining whether in the first instance the decedent had been harmed) and the way that wrongful death damages are calculated have import for how wrongful life actions should be treated. First, no court would say that it is impossible to tell whether someone had been harmed by having been deprived of her life prematurely.²²⁷ Second, since there is no attempt to account for the value of

case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or the gross negligence of the defendant.

See MICH. COMP. LAWS § 600.2922(6) (1986). Michigan law provides:

[T]he court or jury may award damages as the court or jury shall consider equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of society and companionship of the deceased.

N.H. REV. STAT. § 556:12 (Supp. 1997) (“[Damages include] the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money during his probable working life.”); N.D. CENT. CODE § 32-03.2-04 (1996). North Dakota law provides:

[D]amages may be awarded by the trier of fact as follows:

1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.
2. Compensation for noneconomic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damage.

226. See *supra* notes 224-25 and accompanying text.

227. For an analysis of why this is not because life is always thought to be

existence in wrongful death claims, it is not clear why wrongful life awards would have to be decreased by such a value. The Colorado Supreme Court suggested that the "difference between the value of [the child's] impaired existence and the value of his non-existence . . . constitutes the injury (and the *measure of damage*)."²²⁸ Yet, there is no requirement to establish the value of existence for use in the relevant calculation of damages for wrongful death awards, so there should be no such requirement for the calculation of wrongful life awards either.

Courts presume that someone whose life has been shortened prematurely has been harmed,²²⁹ and in most cases that will have been true. Yet, there is no reason to think that is *always* true and, further, there is good reason to believe that society thinks otherwise. As the Supreme Court of California suggested, it is inaccurate to suggest that the "state's public policy establishes—as a matter of law—that under all circumstances 'impaired life' is 'preferable' to 'nonlife,'"²³⁰ given that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition."²³¹ Yet, if the state is willing to admit either that it may be better in some situations not to continue living²³² or that it is appropriate to allow an individual to make that decision for herself, then the possibility that never having lived would be better than having lived a particular life is, if not established,²³³ at the very least suggested.²³⁴

preferable to nonlife, see *infra* notes 229-53 and accompanying text.

228. *Lininger by Lininger v. Eisenbaum*, 764 P.2d 1202, 1209 (Colo. 1988) (emphasis added).

229. See *Farley v. Sartin*, 466 S.E.2d 522, 525 (W. Va. 1995) (discussing tortiously created injuries and the "more egregious harm, death").

230. *Turpin v. Sorriani*, 643 P.2d 954, 962 (Cal. 1982).

231. *Id.* See also *Greco v. United States*, 893 P.2d 345, 354 (Nev. 1995) (Shearing, J., concurring in part and dissenting in part) ("[T]his court has also recognized that the value of an impaired life is not always greater than the value of non-life") (citing *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990)). In *Greco*, Judge Shearing recognized:

[T]he legislature made clear that a person may choose not to sustain life. The underlying policy recognizes that, in some situations, non-life may be preferable to an impaired life; further, the policy recognizes that each individual has the right to make his or her determination as to the relative value of life and non-life.

Id.

232. See *Belsky*, *supra* note 32, at 229 ("Right-to-die cases illustrate the reality that not all life is preferable to nonexistence.").

233. See *Kelly*, *supra* note 182, at 539 ("If courts are willing to accept that death may be preferable to life in some circumstances, it follows ineluctably that never being born also may be preferable in some instances.").

234. See *Hanson*, *supra* note 14, at 7-8 (analyzing positions holding that never having lived at all may be better than having lived with certain conditions).

Some courts and commentators have suggested that refusal of treatment jurisprudence has no relevance to whether wrongful life actions should be recognized. In *Smith v. Cote*,²³⁵ the New Hampshire Supreme Court suggested that in a refusal of treatment case, the "court avoids making an objective judgment as to the value of the plaintiff's life; it strives, instead, to protect the individual's subjective will."²³⁶ However, the court argued that in a wrongful life case the relevant issue is not "protection of the impaired child's right to choose nonexistence over life, but whether legal injury has occurred as a result of the defendant's conduct."²³⁷ Because in wrongful life cases the "necessary inquiry is objective, not subjective,"²³⁸ courts "cannot avoid assessing the 'worth' of the child's life."²³⁹ Because courts allegedly have "no business declaring that among the living are people who never should have been born,"²⁴⁰ the New Hampshire court held that wrongful life actions could not be recognized, suggesting that refusal of treatment jurisprudence was simply irrelevant to the matter at hand.²⁴¹

The New Hampshire court understood that in some refusal of treatment cases the individual herself does not make the relevant decision. However, the court pointed out, even "when the plaintiff is an incompetent, 'the court does not arrogate to itself the individual's choice,' but instead allows the plaintiff's guardian or surrogate to make that choice on his behalf."²⁴² Of course, courts may assure that the request by the guardian or surrogate to end life support is objectively reasonable, if only to help assure that the patient would have made such a request herself if competent.²⁴³ In *Foody v. Manchester Memorial Hospital*,²⁴⁴ the court explained, "If the exercise of the right [to refuse treatment] is to be maintained where no expression has been made by an incompetent patient as to treatment, it must take place within the context of an analysis which

235. 513 A.2d 341 (N.H. 1986).

236. *Id.* at 352.

237. *Id.* at 352-53.

238. *Id.* at 353.

239. *Id.*

240. *Id.*

241. *See id.* at 352-53; *see also* Kathleen Gallagher, Comment, *Wrongful Life: Should the Action Be Allowed?*, 47 LA. L. REV. 1319, 1325 (1987) (suggesting that refusal of treatment jurisprudence has no relevance to whether wrongful life actions should be recognized).

242. *Smith v. Cote*, 513 A.2d 341, 352 (N.H. 1986) (Handler, J., concurring in part and dissenting in part) (quoting *Procanik v. Cillo*, 478 A.2d 755, 771 (N.J. 1984)).

243. *See Belsky, supra* note 32, at 225 ("The substituted judgment approach as expressed in *Quinlan* [*In re Quinlan*, 355 A.2d 647 (N.J. 1976)] embraces both the anticipated, subjective preference of the patient, and the objective, societal view of what is in the patient's best interest.").

244. 482 A.2d 713 (Conn. Super. Ct. 1984).

seeks to implement what is in that person's best interests by reference to objective societally shared criteria."²⁴⁵

The New Hampshire Supreme Court seemed not to appreciate the implications of its concession that surrogates are used in refusal of treatment cases, especially given that an element of "objective" analysis may be included when surrogates are involved. This safeguard, which has been incorporated to protect the incompetent's best interests, puts courts in the position of evaluating when it might be better for a patient not to continue living.²⁴⁶

In wrongful life cases, the plaintiff asserts (usually through a surrogate) that she would have been better off never having lived. Yet, a trier of fact should feel fewer compunctions about making the requisite objective analysis in that kind of case than in one involving an incompetent who seeks (through his or her guardian or surrogate) to have treatment withdrawn, since in the latter the incompetent's life hangs in the balance.²⁴⁷ Thus, the refusal of treatment analysis for incompetents may indeed be helpful to consider in the wrongful life context.²⁴⁸

The New Hampshire Supreme Court explained that in wrongful life cases, unlike ordinary tort cases, "the finding of injury necessarily hinges upon subjective and intensely personal notions as to the intangible value of life."²⁴⁹ Yet, those elements can be represented by the plaintiff herself (perhaps speaking through a representative). Further, an objective element can be added to provide a safeguard to assure that individuals will not misrepresent their views (*e.g.*, by claiming that they would have preferred never to have lived when that is not so) or will not be able to collect compensation merely because of their sincere belief

245. *Id.* at 721.

246. *See Kelly, supra* note 182, at 540. Kelly writes:

When right-to-die cases employ a "best interests of the patient" standard, the resulting inconsistency emerges even more clearly. The implication that death might be in the best interests of the patient certainly suggests a judicial pronouncement about the value of the life involved—or the value of life relative to death.

Kelly, *supra* note 182, at 540.

247. Since this action is not for specific performance, the objective element might be added to assure that the defendant would not be forced to pay when it could not be reasonably thought he had indeed harmed the plaintiff. *See Kelly, supra* note 182, at 541 ("[I]n a genetic counseling tort case, the court's decision in favor of the plaintiff will not affect the child's life expectancy.").

248. *See Belsky, supra* note 32, at 225 ("Equally significant is the concept that life can be of such a minimal quality that a court may conclude that one might prefer death or nonexistence to life."); *see also Tucker, supra* note 14, at 684 ("In cases involving a person's right to die, courts throughout the United States have recognized situations where nonlife is better than life. The recognition of a wrongful life action constitutes a logical extension of the right to die.").

249. *Smith v. Cote*, 513 A.2d 341, 353 (N.H. 1986).

that relatively minor difficulties make living their lives worse than never having lived at all.²⁵⁰

The New Hampshire court's emphasizing that refusal of treatment jurisprudence involves respecting the individual's "subjective will"²⁵¹ may have some surprising implications. Suppose that a competent adult were to bring a wrongful life claim. If indeed refusal of treatment jurisprudence involves a recognition that the subjective quality of life preferences of the individual must be respected, then one would expect that the New Hampshire Supreme Court would recognize a wrongful life claim by an adult. Further, one would expect that the court would refuse to subject such a claim to an analysis of whether it would be objectively reasonable to believe that the individual would have been better off never having lived at all.

The New Hampshire court might refuse to recognize the competent adult's wrongful life claim, although doing so would have its own drawbacks. The court's priorities might be questioned were it willing to accept an individual's quality of life assessment and allow him to refuse treatment and die but unwilling to accept a related assessment²⁵² which would merely allow him to seek compensation so that he could continue to live. Similarly, a court's priorities might be questioned were it to allow a guardian to have medical treatment of a child withdrawn if the guardian could establish that it would be better for that child not to continue to live but were it not to allow a guardian to bring an action for wrongful life on behalf of such a child.²⁵³

It might be suggested that refusal of treatment jurisprudence is inapplicable to wrongful life jurisprudence because dying should not be equated with never having existed.²⁵⁴ While that is true, the point may militate in favor of recognizing wrongful life claims. As one commentator has suggested, "A life of misery may be preferable to death, but never existing at all may be better still."²⁵⁵ Thus, were specific performance requested (and possible) in the wrongful life context, there might be situations in which it would have been better for that person never to have been born, even if it would not be better for that person to stop living.²⁵⁶ Of course, wrongful life does not involve a request

250. *Cf. Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998) (suggesting that to be actionable, "a sexually objectionable environment must be both objectively and subjectively offensive") (citing *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993)).

251. *See supra* note 236 and accompanying text.

252. *See supra* notes 183-86 and accompanying text (discussing why those claims are not equivalent).

253. *See Kelly, supra* note 182, at 544 ("A court willing to accept a substituted judgment that will lead to death ought to accept a substituted judgment that, if supported by the evidence, will lead to a money judgment.").

254. *See Hanson, supra* note 14, at 8 (pointing out that "being dead" and "never having been born" are "not precisely the same thing").

255. *See Peters, Jr., supra* note 184, at 548.

256. *See supra* note 184 and accompanying text (describing an individual who

to bring about one's own death and, thus, recognizing such an action should be thought of as much less of an "assault" on the sanctity of life than should existing refusal of treatment policies.²⁵⁷

Courts and commentators sometimes suggest that the purpose of tort law is to make the person whole or to put the person in his or her original position.²⁵⁸ They then argue that compensation cannot make the plaintiff whole in the wrongful life context and thus should not be awarded.²⁵⁹ Yet, it is frequently the case that tort damages will not put the plaintiff in her original position or make her whole.²⁶⁰ Money damages are often a poor substitute but, of course, are better than no damage award at all.²⁶¹

Some commentators have suggested that the way to return the wrongful life victim to his or her original position would be to kill that person now,²⁶²

might have been better off never having lived even though it would be better for that person to continue living now).

257. For a discussion of refusal of treatment jurisprudence and the sanctity of life, see Mark Strasser, *Assisted Suicide and the Competent Terminally Ill: On Ordinary Treatment and Extraordinary Policies*, 74 OR. L. REV. 539, 552-53 (1995).

258. *Berman v. Allan*, 404 A.2d 8, 11 (N.J. 1979) ("The primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others."); *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) ("The remedy afforded an injured party in negligence is designed to place that party in the position he would have occupied but for the negligence of the defendant.") (citing *Martin v. Julius Dierck Equip. Co.*, 374 N.E.2d 97, 99 (N.Y. 1978)); *Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984) ("The basic rule of tort compensation is that the plaintiff is to be put in the position that he would have been in absent the defendant's negligence.").

259. *See Goldberg v. Ruskin*, 499 N.E.2d 406, 409 (Ill. 1986) ("Compensatory damages are intended to restore a person to the position he occupied before the occurrence of the injury complained of or to compensate the person for the loss . . . [and] the required comparison cannot meaningfully be made in the context of wrongful life."); *see also Cowe by Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 634 (Ind. 1991) (discussing "the impossibility of calculating compensatory damages to restore a birth defective child to the position he would have occupied were it not for the defendant's negligence"); *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967) ("By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.").

260. *See Anthony Jackson, Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L.J. 535, 569 (1995) ("It is no easier to return the plaintiff's negligently crushed left arm than it is to return him to oblivion. Tort damages are only 'compensatory' to the extent that they award monetary remedies to someone who has suffered a wrong.").

261. *See Capron, supra* note 122, at 655 ("Although a monetary judgment for pain and suffering cannot make them 'whole', any more than it actually does for most injured persons, it may provide some balm for the inner wounds of congenitally defective children.").

262. *See James Bopp, Jr., et al., The 'Rights' and 'Wrongs' of Wrongful Birth and*
<https://scholarship.law.missouri.edu/mlr/vol64/iss1/7>

although of course they are not recommending that course of action. Nonetheless, such an analysis incorporates at least two mistakes. First, the plaintiff may not desire and in any event is not requesting to be allowed to die now, but is merely asking for compensation which might in fact allow the person to continue to live. Second, even if the person did want to die and even were that desire fulfilled, e.g., by removing her from necessary life-support, she would not thereby have been compensated for all of the mental, physical, and financial costs that she had already incurred.

A consideration of refusal of treatment jurisprudence casts considerable light on societal values regarding life and death issues. Because there may be an objective component when refusal of treatment decisions are made for incompetents and because treatment may nonetheless be withheld or withdrawn in those cases,²⁶³ it seems clear that society does not believe that life is always preferable to death. Further, it simply is not credible to claim that the sanctity of life is undermined by the recognition of an action for wrongful life, given society's existing refusal of treatment practices.

V. CONCLUSION

Very few jurisdictions are willing to recognize wrongful life claims, although the rationales for that refusal often involve specious arguments and, in any event, are unpersuasive. Each of the elements of the tort claim can plausibly be established in at least some wrongful life cases, and the reasoning employed to nonetheless preclude recognition of those claims would seem to have important implications for the continued recognition of other existing tort claims.

Wrongful birth claims are premised on an individual's having negligently caused a child to be born. The tortfeasor is and should be required to pay compensation for the harm that he has caused in those kinds of cases. However, the wrongful life claim is based on the same kinds of considerations, and although not all cases involving justified wrongful birth claims will also involve justified wrongful life claims, at least some will, and in those cases compensation should be awarded.

Wrongful Life: A Jurisprudential Analysis of Birth Related Torts, 27 DUQ. L. REV. 461, 503-04 (1989).

263. See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 428 (Mass. 1977). In *Saikewicz*, the court stated:

If a competent person faced with death may choose to decline treatment which not only will not cure the person but which substantially may increase suffering in exchange for a possible yet brief prolongation of life, then it cannot be said that it is always in the "best interests" of the ward to require submission to such treatment.

Id.

Courts and commentators claim that they cannot determine whether the wrongful life plaintiff has been injured and thus cannot allow recovery. Yet, if that determination cannot be made because it is impossible to know whether an individual is better off living rather than not living, then it would seem that wrongful death claims should not be allowed. If that determination cannot be made because it is always better to live even with great suffering than not to live, then our refusal of treatment jurisprudence (at least involving incompetents) must be radically changed.

A recognition of an action for wrongful life would reflect rather than undermine societal values. Further, given the tort actions and refusal of treatment practices already permitted by law and given the kinds of specious arguments which must be offered to distinguish the wrongful life claim from other actions, the failure to recognize an action for wrongful life does more harm to innocent, deserving individuals and to the existing birth-related tort jurisprudence than the recognition of such an action ever could.